No. 11901

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY BRODERICK, Administratrix with the will annexed of the Estate of Eugene H. Ware, deceased,
Appellant,

VS.

THE TRAVELERS INSURANCE COMPANY, a corporation, and THE TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

Appellees, (defendants below) being dissatisfied with the appellant's statement of the case, present the following summary:

This suit was originally instituted by an insurance agent, Eugene H. Ware, a resident of Coeur d'Alene, Idaho, claiming to recover substantial commissions from the appellees, insurance companies of Hartford, Connecticut, solely because said Ware countersigned certain policies of insurance issued by the defendants outside the State of Idaho and not negotiated, solicited or procured within the State of Idaho or by the said Ware.

The defendants' motion to dismiss the complaint was originally granted by the court below on the ground that the statute, Sec. 40-902 I.C.A., as amended by Chapter 61, Idaho Session Laws, 1939, relied on by the plaintiff, was unconstitutional. On appeal, judgment of dismissal was reversed, this court upholding the *prima facie* constitutionality of the statute, but deferring a ruling upon a number of other local law questions in the case (App. 1).

After remand, issues were made up on the basis of the defendants' answer (R. 35), plaintiff's reply (R. 51) and trial amendment to answer (R. 55) expressly again raising the question of the constitutionality of the statute involved relied on by plaintiff.

Eugene H. Ware (now appearing by plaintiff as administratrix) was a resident and citizen of Coeur d'Alene, Idaho, and since January 1, 1936, a duly licensed insurance agent under Idaho law. The defendants were and are Connecticut insurance companies lawfully doing business in Idaho, conducting their business jointly and substantially as one. The amount in controversy exceeds $3,000, exclusive of interest and costs.

On October 1, 1936, Ware and defendants entered into a written agency contract (R. 16-21). That contract was amended on a number of occasions (Exh. A-1 through A-9 inclusive, R. 22-31). This contract stated that the territory within which Ware might act was Coeur d'Alene and vicinity, Idaho; provided for the payment of commissions "on proposals secured by or through the agent, as full compensation for all services and full reimbursement for all expenditures;"

authorized the countersigning of policies pertaining to the lines of insurance covered by the contract; and contained other conditions and stipulations with respect to Ware's contract as an agent. The amendment contained in Exh. A-2 (R. 23) made the commission rates stipulated in Exh. A inapplicable under certain conditions. About October 21, 1936, the said Ware and defendants entered into a valid supplemental agreement by which defendants agreed to pay Ware and said Ware agreed to accept a monthly remuneration of $5 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware (Ex. 7, 22, R. 50, 120, 162). Later, defendant, Travelers Indemnity Company, appointed attorneys-in-fact, including said Ware, for the execution of bonds (R. 31). Thereafter, the parties entered into the performance of the aforesaid contracts, the said Ware countersigning policies and receiving payment therefor as per contracts aforesaid.

In May, 1942, the defendants made, wrote and placed in the State of New York, through Acme Brokerage Corporation, insurance advisor of the Walter Butler Company, three insurance policies (including Workmen's Compensation) required by the U. S. Navy in connection with and covering the construction by the Walter Butler Company (under a cost-plus-a-fixed-fee contract it had with the U. S. Navy) of the Faragut Naval Station at or near Bay View, Idaho (R. 82). The insurance coverage required under that construction contract was under the jurisdiction of

the Bureau of Yards and Docks of the United States Navy (R. 80). That Bureau required the insurance to be issued under the Comprehensive Insurance Rating Plan for National Defense Projects, later designated as War Projects Insurance Rating Plan. The War Projects Insurance Rating Plan was a form of retrospective rating under the terms of which the final premiums for the three policies were determined after operations were completed, upon the basis of certain fixed charges and the composite losses developed under the three policies. The premium contained no provision for profit to the insurance carrier (R. 81) and contained no provision for payment of commission to a procuring agent (R. 82). Deposit premiums and interim payments were made to the defendants in accordance with the provisions of the rating plan. The detailed nature and reasons for the plan will be more fully developed hereinafter. The final earned premium for the three policies computed in accordance with the terms of the rating plans was $246,127.56 resulting in a net saving to the U. S. during wartime over what would otherwise have been payable of the difference between a standard premium of $1,294,608.42 and the earned premium of $246,127.56 or $1,048,480.86 (R. 84-5).

Later, in February, 1943, two additional policies were issued on a standard premium basis covering certain liability in connection with the Bozanta Tavern located near Hayden Lake, Idaho. The earned premiums on these policies were slightly over $100 and were paid to defendants through Acme Brokerage Corporation of New York, who placed such insurance business with the defendants in New York (R. 87).

As to the first three policies, written under Comprehensive Insurance Rating Plan, and, therefore, written on a retrospective basis, no commission was payable to Ware because (1) he did not procure the business, and (2) no commission was fixed as payable to Ware, as was required under the terms of the Exhibit A-2 amendment to his agency contract (R. 23) if Ware was to receive any commission on risks written on a retrospective basis. Furthermore (R. 165), no commission was paid to anyone by the appellees in connection with the procuring of said business. Those policies were made, written and placed in New York City and were not submitted to Ware by any licensed broker.

As to the rate of commission ordinarily paid, the court found from the evidence that the rate in Idaho is customarily fixed by contract between the insurance carrier and the insurance agent on terms mutually satisfactory to each. There was no evidence as to any customary rate of commission in the case of policies written on a retrospective basis or under the Comprehensive Insurance Rating Plan. Furthermore, evidence offered on behalf of plaintiff (R. 111) was that the rate of commission varied with the size of the policy or risk, the rate going down as the size of the risk goes up; and that even such rate varied with the various companies.

Eugene H. Ware countersigned each of the first three policies and indemnity bonds in connection therewith and later countersigned the two Bozanta Tavern policies. Ware's services were confined to the simple, formal act of countersigning the policies and bond and

mailing the policies to New York and the bonds to the Industrial Accident Board of Idaho (R. 86). The evidence involved showed that Ware had nothing whatsoever to do with the servicing of the policies involved, they being handled independently (R. 232, *et seq.*).

The countersigning services rendered by Ware were rendered under and pursuant to the countersigning authority provided for in the agency contract dated October 1, 1936, (Exh. A, R. 19) and under and pursuant to the supplemental contract of October 21, 1936, in which said Ware agreed to accept a monthly remuneration of $5.00 for such countersigning services. The court found that Eugene H. Ware had been paid in full by the defendants for such countersigning services (R. 76, 88, 91).

Section 40-902 of the Idaho Code Annotated as amended by Chapter 61, Laws of 1939, page 109, was in effect when the countersigning services were rendered (R. 88, App. 1).

The court found from the evidence that when the countersigning services were rendered, defendants were foreign insurance companies licensed to do business in Idaho and engaged in interstate commerce both with respect to the making, writing and placing of insurance policies and the servicing thereof; and that the making, writing and placing of insurance policies and instruments involved were in the course of and constituted an act of interstate commerce (R. 89).

The court found that under Idaho law no service whatsoever is required of a countersigning agent except the simple, ministerial act of countersignature

(R. 86, 89); and that such service of a countersigning agent is required only in the case of policies issued on Idaho risks by foreign insurance companies and that no such requirement exists as to domestic companies (R. 90). In that connection, the court found that at the time in question there existed in active business and in active competition with the defendants, the Idaho Compensation Company, a domestic insurance company of Idaho, and that the countersignature statute involved did not apply to such company (R. 90).

The court then held that the Idaho statute aforesaid was constitutional under the doctrine of the law of the case; that the statute contains no provision fixing the amount of commission that should be paid to Ware for countersigning services rendered by him; that no provision of the statute applied to the facts in this case so as to permit recovery; that customary commissions, if any, paid on insurance proposals secured in Idaho by Idaho agents form no basis for awarding commissions to the plaintiff in this case; that the plaintiff had been paid for countersigning services rendered under Ware's agreement to accept $5 per month therefor; and that the defendants were entitled to judgment of dismissal and costs (R. 91).

Broderick v. Travelers Ins. Co. et al., 73 F. Supp. 354.

These local law questions having been now decided, this Court now has the "benefit of the contribution which the Federal Judge in Idaho is in a position to make." *Unless this contribution is clearly erroneous it should be accepted.*

Plaintiff concedes that the facts involved are largely undisputed, (Ap. Br. 18); and his Specifications of Error (Ap. Br. 20) (which are narrower than his Statement of Points (R. 267, *et seq.*)) are apparently not based on want of evidence to support the findings of fact, but are based rather on a disagreement with the application or validity of the legal principles applied to the admitted facts (Ap. Br. 20).

We proceed now with argument in support of the judgment of dismissal below. Such additional statement of facts will be made as may be necessary in connection therewith.

OUTLINE OF ARGUMENT

1. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the October 1, 1936, Agency Contract as amended because; (a) Eugene H. Ware did not secure the proposals for the insurance involved; (b) the commissions stipulated in the contract were not applicable because of conditions stated in Exhibit A-2; (c) no commission was fixed for the insurance involved, as contemplated by Exhibit A-2; (d) the agency contract contained no provision for the payment of any commission for countersigning services.

2. There is no right of recovery for countersigning services rendered by Eugene H. Ware because of the provisions of the supplementary $5 per month contract dated October 21, 1936.

3. The plaintiff is not entitled to commissions for countersigning services rendered by virtue of the provisions of Section 40-902 I. C. A. as amended by

Chapter 61, Idaho Session Laws of 1939 because (a) the phrase "the full commission" is applicable only if a commission is paid or payable. The 5% provision applicable to applications submitted by brokers is inapplicable here; (b) the defendants did not make, write or place or cause to be made, written or placed in Idaho any policy or bond here involved so as to otherwise render the statute applicable; (c) The Idaho Statute is clearly different and distinguishable from the Montana and Virginia Countersignature Statutes, and (d) the statute, Section 40-902, does not confer a cause of action in favor of the plaintiff against the defendants.

4. Ware waived any commissions otherwise recoverable by his contract of October 1, 1936, and supplementary $5 per month contract of October 21, 1936.

5. The Idaho Resident Agency Statute involved (Section 40-902), if construed in accordance with the plaintiff's contentions, conflicts with the XIVth Amendment and the Commerce Clause being arbitrary and excessive for the protection of the local interest and discriminating on its face and in fact against interstate commerce. It is accordingly invalid and furnishes no basis for any recovery that might be claimed under the statute. The constitutional questions are still in the case.

6. Appellant's brief does not correctly and adequately state the facts, nor are appellant's contentions valid. In particular, appellants following contentions are invalid: (1) that salaried agents are prohibited by Idaho Statute; (2) that all questions have been resolved in the plaintiff's favor by the case of *Ware*

v. Travelers Insurance Co., 150 F.(2d) 463; (3) that the contract of October 1, 1936, fixes the rate of recoverable commission; (4) that the phrase "full commission" contained in Section 40-902 means the commission payable as if the insurance had been procured by Ware and was not written on a retrospective or special commission basis and was written without the War Projects Insurance Rating Plan; (5) that the War Projects Insurance Rating Plan is inapplicable and illegal; (6) that the supplementary contract of October 21, 1936, is void as against public policy, and (7) that the plaintiff has a direct cause of action under Section 40-902.

7. Conclusion. The district court, pursuant to the mandate of this court to determine the local law questions involved, having resolved all controlling issues in favor of appellees, and having entered judgment of dismissal, the district court's action should be affirmed.

ARGUMENT

(References hereinafter to a finding of the trial court will bear the letter "n" whenever such finding is not objected to in the respect discussed in Appellant's Specifications of Error (App. Br. 20-25). Findings will not, of course, be set aside even if objected to unless "clearly erroneous." Rule 52(a), Rules of Civil Procedure (App. 2). References to App. refer to appendix.

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1. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936, as amended, because

(a) Eugene H. Ware did not secure the proposals for the insurance involved.

The Agency Contract (R. 16, par. 4) provides for the payment of stipulated commissions "on proposals secured by or through the agent as full compensation for all services and full reimbursement for all expenditures," the agent's territory being confined to Coeur d'Alene and vicinity, Idaho.

The trial court found (Finding VIII, *n*, R. 87): "That none of said policies was written pursuant to proposals secured by Eugene H. Ware." Accordingly, no compensation is payable to plaintiff by virtue of the agency contract.

(b) The commissions stipulated in Exhibit A were not applicable under the conditions stated in Exhibit A-2.

The basic agency contract, Exh. A. (R. 16-21) was amended effective June 1, 1940, by Exh. A-2 (R. 23) to provide

"on risks written on a Retrospective or Special Commission basis,

"on risks or portions of risks which are in states other than that indicated in the territory described in your Agency Agreement, and

"on Bonds involving execution or countersignature by another Agent (provided your Agency Agreement includes Surety Lines),

"the commissions which you may retain out of premiums paid to the Company will be fixed on the basis of the individual risk, anything in your Agency Agreement to the contrary notwithstanding."

The commission rates stipulated in Exhibit A were thus abrogated under the conditions stated.

The trial court found (R. 81-85) on the basis of uncontradicted evidence (R. 133) that the first three policies involved (Compensation Policy WUB-863386, Liability Policy WSLG-863387 and Automobile Liability Policy WSLA-863388) were written on a retrospective basis in accordance with the War Projects Insurance Rating Plan.

(c) There is no proof that a special commission for Eugene H. Ware was fixed for the insurance here involved within the meaning of Exhibit A-2.

The court found (Finding VI, *n*, R. 86):

"That no commission was fixed or payable as provided in Exh. A-2 of the contract attached to the complaint (dealing with the risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan."

To be entitled to any commission under the terms of

his agency contract, Ware had to produce the business. Had he produced this retrospective business, no commission would have been fixed for it because, under the terms of the Comprehensive Insurance Rating Plan, no commission was payable or was to be paid.

(d) Agency Contract — Exhibit A — Contained no provision for the payment of any commission for countersigning services.

Paragraph 8 of Exhibit A authorized Mr. Ware to countersign policies "pertaining to the lines of insurance covered by this contract." This countersigning authorization was broad enough to include policies for business not produced by Mr. Ware. It would have been entirely proper of course to have agreed with Ware that the commissions earned under the terms of Paragraph 4 of Exhibit A were to include some incidental countersigning of other policies with the authorization granted in Paragraph 8. As stated in *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924:

> "There is no requirement of public policy preventing the parties from so grading the rates of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well."

No separate compensation being provided for countersigning services (such services being included in commissions payable on policies calling for such commission) plaintiff cannot recover under the Agency Contract for rendering such countersigning services.

3 C.J.S. 69, §176.

2. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the supplementary $5.00 per month Contract dated October 21, 1936. (Exhibit 1, R. 50-51).

As previously stated it would have been entirely proper for the defendants to have agreed with Mr. Ware that the commissions which he earned under the terms of his agency contract were to include compensation to him for any countersigning which he did for the defendant companies of policies of insurance which he did not secure.

However, it was agreed that the defendants would pay Mr. Ware $5.00 per month as an Idaho agency for handling a small amount of countersigning. This supplementary contract (Exhibit 1-R. 50-51) was fulfilled by the parties for five years and eight months without any question being raised as to its propriety. Checks were sent by the defendants to Ware for each month beginning with October 1936 and through and including May 1942 and Mr. Ware cashed all of these checks, the May 1942 check for the month in which he countersigned the three policies under the Comprehensive Insurance Rating Plan having been cashed by him on June 3 ,1942 (Def. Ex. 6, R. 119).

The court found (Finding IX, R. 87-88):

> "That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants, as found by Paragraph III of these findings of fact. That on or about October 21, 1936, the said Eugene H. Ware entered into a valid supplemental agreement with the defendants by the terms of which defendants agreed to pay to the said Eugene H. Ware and Eugene H.

Ware agreed to accept a monthly remuneration of $5.00 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware. That the aforesaid contract and supplemental agreement thereafter continued in full force and effect and the countersigning services rendered by Eugene H. Ware were rendered under and pursuant to the aforesaid contract and supplemental agreement. That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered."

3. Sec. 40-905 I.C.A., prior to the July 1, 1947 amendment, authorized countersigning services to be rendered for compensation by way of salary or for no compensation if the insurance company and the agent so agreed.

At the time of the transactions in question, Idaho had no statute fixing premium rates and had no statute fixing compensation to be paid to agents. Sec. 40-905 defined an agent as "any person who, *for compensation, or otherwise,* solicits insurance * * * or in any manner aids in the transaction of the business of an insurance company." The term "compensation" is sufficiently broad to cover compensation by way of commission or by way of salary. The term "or otherwise" is used in contradistinction to the term "compensation." It is broad enough to mean "no compensation" because no compensation would be "otherwise" than compensation. The reference to "aiding in any manner" indicates services, in addition to those first mentioned in Sec. 40-905; i.e. the solicitation of insurance and the receiving of applications and the

transmitting of an application for a policy. Obviously, therefore, when Ware agreed by his contract of October 1, 1936, that no separate compensation was to be paid for countersigning services rendered thereunder, and when he agreed by his supplementary contract to be paid $5 per month for a small amount of countersigning services, he was performing the services of an agent in the manner and under the terms and conditions specifically authorized by Sec. 40-905.[1]

4. The plaintiff is not entitled to commissions for countersigning services rendered, by virtue of the provisions of Sec. 40-902 I.C.A. as amended by Chapter 61, Idaho Session Laws of 1939.

(a) The meaning of the phrase "the full commission" in Sec. 40-902.

(1) The phrase "the full commission" means "full commission, if any."

The trial court found (R. 85, 86) that no commission was payable or paid by the defendants to any agent or broker for placing the insurance on the construction of the Farragut Naval Station with the defendants. He concluded (R. 91) that the statute "contains no provision fixing the amount of commission that should be paid to the plaintiff for countersigning services rendered by him, nor does any provision of said statute apply to the facts in this case so as to permit recovery, * * *." It is, therefore, pertinent to in-

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[1]The correctness of the foregoing analysis is emphasized by the fact that under the July 1, 1947 amendment to Sec. 40-905, the language "compensation or otherwise" has been eliminated and there has been substituted therefor the phrase "* * * compensated * * * on a commission or salary basis, or both, * * *."

quire concerning the meaning of the phrase "the full commission" contained in the statute on which plaintiff relies.

Insurance companies compensate agents who secure proposals for insurance either by salary, commission, or salary and commission. Mutual casualty companies generally write on a no-commission basis through salaried employees, whereas stock companies usually write insurance on a commission basis. However, such business practice is not inexorable because mutual casualty companies may write on a no-commission basis. Generally speaking, however, as stated in Kulp, Casualty Insurance, p. 173,

> "The mutual * * * is organized usually on the branch office system and thus reduces its production cost, because its employees receive a salary instead of the rather liberal commissions paid by stock companies to their agents."

The evidence in the case at bar shows that this statement is true both within and without the state of Idaho. Indeed, Idaho recognized that an insurance agent may be either a salaried or a commissioned agent, because Section 40-905 defines an agent as "any person who *for compensation, or otherwise,* solicits insurance in behalf of any company receiving applications for insurance." The statute, it will be noted, does not say "any person who for commission * * * solicits insurance"; it uses the broader term "for compensation," which obviously may be in the form of salary. It is apparent, therefore, that in Idaho, as elsewhere, an insurance agent may produce insurance business and be compensated either by way

of salary or by way of commission, or by a combination of both. Nothing in the Idaho law requires any particular method of compensation, that being left to the parties to determine by their agreement. Indeed no compensation for a special service need be fixed (p. 15 *supra*).

As stated in *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, 927, involving a a suit by an insurance agent to recover commissions on home office issued policies that he had countersigned:

> "The argument of the plaintiff would be more persuasive if the act specified the rate of commission to be collected. The absence in the act of a specific requirement concerning the rate to be paid permits the parties to fix for themselves the rate of commission and method of payment."

Bearing the foregoing discussion in mind, let us consider Section 40-902 to the extent here applicable on the question of compensation to countersigning agents. That statute provides, with respect to foreign companies,

> "A resident agent shall countersign all policies so issued * * * and shall receive the full commission when the premium is paid * * *."

Obviously, the statute can have no application in the case of a policy in connection with which a commission is neither paid nor payable. Thus, in the case of a mutual company issuing a policy through a salaried agent, no commission is payable; or in the case of a stock company issuing a policy on a no-commission basis, no commission is payable. The most that can

be reasonably contended for, in view of the well recognized insurance practice and the right of salaried agents to be insurance agents, is that the statute means merely that a resident agent who countersigned shall receive "the full commission" if the policy has been issued on a commission basis so that a commission is paid or payable. The statute does not say that policies can be issued only on a commission basis, nor does it say whose commission is involved—that is, whether a producing agent, a regional agent, or a general agent. Nor does it define the word "commission." Nowhere else in the Insurance Code is there any statutory regulation of compensation payable. Under such circumstances, the phrase "the full commission" merely means the full commission, whatever it is, or if any there be, payable in connection with the securing of insurance proposals. If there be no commission paid to any agent—especially if none is paid or payable to a producing agent—then none can be payable to the countersigning agent. Any compensation that the countersigning agent is to receive for his services in countersigning is then left to agreement between the countersigning agent and the insurance carrier.

The interpretation here suggested not only takes into account the practices of the insurance world in connection with which the statute should be read; it also avoids the objection that an unconstitutional discrimination exists as between companies writing insurance on a no-commission basis and companies writing insurance on a commission basis. To require stock companies to pay a commission to countersign-

ing agents and to free mutual companies of such a requirement because of their method of doing business would be violative of the XIVth Amendment. *Hartford Steam Boiler Inspection & Ins. Co. et. al. v. Harrison*, 301 U.S. 459. The interpretation here suggested, however, puts both stock and mutual companies, each of whom may write business on a no-commission basis, on a parity. If a commission is payable on a policy, whether written by a mutual or a stock company, then the statute treats both companies alike. Similarly, if a policy is written on a no-commission basis by a mutual company or by a stock company (policies written under the War Projects Rating Plan), then stock and mutual companies are treated alike, without discrimination. In the case at bar, the evidence shows that policies written under the War Projects Rating Plan were written by both stock companies and mutual companies, on a no-commission basis.

If Section 40-902, in its use of the phrase "the full commission," means "the full commission, if any there be," then obviously the plaintiff cannot recover as to the three policies written under the Plan, regardless of any other question in the case. As to the last two policies not written under the Plan, and with respect to which a commission was paid to New York brokers, this argument is not available, and recourse must be had to the argument next stated, which argument also provides an additional reason in support of the defendants' contention that the plaintiff is not entitled to recover.

The argument referred to may be stated as follows: Appellees have pointed out heretofore and will point

out hereinafter additional reasons why Ware is not entitled to recover. At this point, however, it is sufficient to call attention to the fact that Ware has been paid in full because (a) under Ex. A, par. 4 and par. 8, Ware is required to render countersigning services without additional charge; nevertheless, (b) the parties have agreed on additional compensation for countersigning policies produced outside the state (Ex. 7, 22), by entering into the $5-per-month contract hereinbefore described. Under this contract Ware regularly collected $5 a month from October 1, 1936, to and including May 31, 1942, and there is no evidence that the contract was ever cancelled. Accordingly, compensation payable under Ex. A, par. 4 and par. 8, and under the $5-per-month contract, constitutes "the full commission" payable to Ware for countersigning and for which he has been paid in full. *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co., supra*, p. 927:

> "There is no requirement of public policy preventing the parties from so grading the rates of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well."

Appellant claimed that Ware was entitled to recover customary commissions payable to agents who might have procured such business in Idaho (Ap. Br. 26, *et seq.*). The trial court rejected that contention (R. 75, 91) partly because the statute did not so provide (*Birdsall-Friedman Co.* case *supra* so holds) and partly because the evidence failed to show the existence of the custom claimed (R. 90). In fact,

plaintiff's own evidence (R. 111) showed that the rate of commission payable to a producing agent in Idaho varied with the size of the policy or risk, the rate going down as the size of the risk went up and that even such rate varied with the various companies. There was evidence that no commission would be payable with respect to the retrospective policies in question, the policies being written under the War Projects Insurance Rating Plan.

Appellant also claimed that the full commission is that commission which would be payable if the agent produced the business himself, citing the opinion of the Attorney General of Montana to that effect with reference to the distinguishable Montana statute, *Springfield Fire and Marine Ins. Co. v. Holmes*, 32 F. Supp. 964. The court in the *Springfield* case did not pass upon the correctness of the interpretation; it merely proceeded to examine the constitutionality of the Montana statute as so interpreted. The court carefully said, 32 F. Supp. 986:

> "In this view we do not feel called upon to consider or determine, and do not consider or determine, whether Chapter 95 of the Laws of Montana, 1937, may be so construed as to bring it within the constitutional power of the Legislative Assembly of the State of Montana."

In the *Springfield* case the policy involved was written on a commission basis, a commission having in fact been paid to the broker securing the business. The Circuit Court of Appeals in the Ware case, by its reference in Footnote 3 to the Attorney General's opinion, does not decide that the Attorney General's opinion is

correct; it merely refers to that opinion in passing, leaving to the District Judge on the trial of this case the proper interpretation of the phrase "the full commission."

The District Judge below held that the phrase "the full commission" did not entitle the plantiff to recover (R. 76, 91). It is obvious that the Attorney General's opinion with respect to the Montana law was not rendered in respect to policies written under the Comprehensive Insurance Rating Plan on a no-commission basis.

Assuming, however, that the phrase "full commission" has the meaning attributed to it by the Montana Attorney General, what would have been the commission payable to Ware had he secured the first three policies written under the Comprehensive Insurance Rating Plan? Obviously, nothing.

R. 172:

> "Q Mr. Peterson, if this business had been placed in Idaho, this business covered by the three policies here, under the War Projects Rating Plan would any commission have been payable to any producing agent under that plan?
>
> A. No."

(2) Section 40-902 does not prohibit the countersigning agent from sharing the commission with another or from making any arrangements in relation thereto which are satisfactory to him.

Section 40-902 stipulates "that a resident agent shall counter-sign all policies so issued * * * and shall receive the full commission when the premium is paid,".

There is no provision in the statute that the agent shall not pay or divide the commission with anyone who has assisted in procuring the business. In this respect the provision is in contrast with Section 40-1002 (App. 2) in which it is expressly provided, with reference to a licensed special agent assisting a local agent in writing business that "local agent is to retain his full commission."

The absence of any express prohibition against the countersigning agent dividing his commissions with a producing agent or against his making any other arrangements in relation thereto which are satisfactory to him and to the company and to the producing agent is in contrast to the provisions of the Montana statute reading—

> "It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this act."

The Idaho statute is also in contrast on this point with the provisions of the Virginia statute which are that the resident countersigning agent shall be entitled to and shall receive "the usual and customary commissions * * * provided * * * the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding 50% of the resident agent's or agency's commission allowed on such business."

(3) The 5% provision inapplicable.

During the course of trial and argument, reference was made to the fact that under Sec. 40-902 there was a further provision that "when said policy is made,

written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid: * * *" The reference to licensed broker obviously means a licensed broker under Idaho law. Plaintiff does not claim that the policies were made, written or placed by a licensed broker. Paragraph IX of the complaint alleges "that all of the policies were written by the Company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that the plaintiff acted as countersigning agent direct and not through any licensed broker." Indeed, the only licensed brokers under Idaho law that could exist in the years 1942 and 1943 were licensed fire insurance brokers under Chapter 15, Title 40, I.C.A. 1932 (App. 2).

It is true that an act relating to insurance brokers generally became effective on April 30, 1943, Session Laws of Idaho 1943, Chapter 172. That statute was approved March 8, 1943, without an emergency clause; therefore, it did not become effective until 60 days after the end of the legislative session, which ended on February 28, 1943 (see p. 408 of 1943 Session Laws), making the effective date of the act on or about April 30, 1943. See also Section 65-510 I.C.A. (App. 3).

However, the first three policies here involved were issued May 18, 1942, and the last two policies were issued in February, 1943; hence, all five policies were issued and countersigned at a time when the only licensed brokerage law was the law applicable to fire insurance brokers. None of the policies here involved

is a fire insurance policy; consequently, there is no basis for applying the 5% of the premium exception above quoted.

Appellant conceded this below as noted by the trial court (R. 71).

(b) The defendants did not "make, write, place, or cause to be made, written or placed in this state" any policy or bond here involved so as to entitle plaintiff to commissions if any were payable, even though the policies were on "property * * * located in this state."

(1) Preliminary Statement.

The court found on the basis of uncontradicted evidence (R. 80, Finding VI, *n*, 82).

> "That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies: (describing the first three)."

With respect to the two small policies the court found (Finding VII, *n*, R. 87):

> "That premiums for each of said policies were paid to the defendants through Acme Brokerage Corporation of New York, N.Y., who placed said insurance business with the defendants in New York."

Section 40-902 I.C.A., as amended (Finding X, *n*, R. 88, Br. p. 6, *supra*) forbids a foreign insurance company doing business in Idaho,

"* * * to make, write, place or cause to be made, written or placed *in this state* any policy or contract of insurance of any kind or character, * * * upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business therein." (Italics ours)

A second requirement is that:

"A resident agent shall countersign all policies *so issued* (except policies of life insurance) * * *." (Italics ours)

General comments as to the history of the statute.

In appellees' brief on the first appeal the history of Section 40-902 I.C.A., as amended, was carefully reviewed (Br. for Appellees, p. 10, *et seq.*) with a view to pointing out that the distinction between "making, writing or placing" and "countersigning" was justified, not only by present textual analysis, but also by consideration of the statute's history. It was further demonstrated that the words "policies made, written or placed" were more restricted in meaning than "policies on risks in this state." The same historical discussion made quite clear the fact that language "in this state" added to the statute by amendment in 1915 after the words "to make, write, place or cause to be made, written or placed" were intentionally inserted to restrict the operation of the statute. By reason of space limitations, the former discussion is not repeated.

(2) The words "made, written or placed* in this state" *contained in Section 40-902 show that the section does not apply to the policies and bond issued to the Walter Butler Company, because they were negotiated and written outside of Idaho.

The heart of Section 40-902, in so far as here applicable, is that it is declared unlawful for any foreign insurance company doing business in the state

> "to make, write, place or cause to be made, written or placed *in this state* any policy * * * of insurance * * * upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state * * *. A resident agent shall countersign all policies so issued * * * and shall receive the full commission when the premium is paid * * *." (Italics ours)

The words in italics 'in this state' were *deliberately* added to the statute in 1915 (Idaho Session Laws 1915, Chapter 145, §131, p. 318). The same words were also and *deliberately* added to Section 40-809 by Chapter 145, Session Laws of 1915. The words "in this state" inserted by the Idaho Legislature in 1915 after the word "placed" were intended either to confirm the prior understanding as to the restrictive character of the statute or to impose a restriction not theretofore existing (See *United Pacific Co. v. Bakes* (Ida.) 67 P.(2d) 1024, p. 1028) (App. 3-4).

It may be that one reason for the amendment by the insertion of the words "in this state" was the doubt then entertained as to the constitutionality of a statute which purported to apply to contracts of insurance made outside the state. See *Hyatt, State Ins.*

Com'r. v. Blackwell Lumber Co., 31 Ida. 452, 173 Pac. 1083 (1918), involving Laws of 1913, Chapter 185, Sec. 15.

Space limitations do not permit us to repeat the textual analysis made of Section 40-902 in the Brief for the Appellees, p. 20, on the first appeal in the Ware case.

It would seem clear that the words "make, write or place" were used in the statute to cover all situations in connection with the negotiation or production of business. They are words of similar import, and mean substantially the same thing in so far as the underlying purposes of this statute are concerned.[2]

The apparent intent of the statute was directed toward the activities in Idaho of agents of foreign insurance companies and its object was to see that business originating in or solicited or procured in Idaho should be handled only through a resident licensed agent in the state.

The key to this intent is furnished by the title to the original act (House Bill No. 73, 1901 Idaho Laws, page 138) which reads:

> "An Act to Prevent Non-Resident Insurance Agents from Writing Any Policy or Contract of Insurance Within the State of Idaho."

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[2]In *Potomac Fire Insurance Company v. State* (Tex.) 18 S.W.(2d) 929, 931, there appears the following from the stipulated facts:

"When an agent has solicited and secured an application for insurance from a property owner, the agent selects one of the companies which he represents, and 'places' or 'writes' the risk in the company so selected by him."

It is interesting to note that when the Idaho Legislature wished to avoid any restriction for tax purposes, it provided in Section 40-803 (App. 4) (dealing with fire and marine insurance) that the premium tax was applicable "on risks situated in this state"[3] and in 1921, when it wished to impose no restriction on the kind of policies with which it was dealing, the statute provided (40-1501, Laws 1921, Chapter 1943) that its operation would be with respect to "business on property or risks located in Idaho." Such statutes evidence clearly by contrast the deliberate restrictive character of the countersignature statute, 40-902, and as further evidencing the fact that such a restriction is by no means inadvertent (App. 2).

A comparison of the Idaho countersignature requirements with those in other states shows that the "in this state" limitation is pursuant to a definite policy to confine the operation of the countersignature statute to Idaho risks only when the policy is made, written or placed in Idaho. Countersignature statutes for present purposes fall into three general classes: (a) states (seven, including Idaho) requiring countersignature of policies on risks located in the state only when the policies are made, written or placed in the state involved (App. 6); (b) states (fourteen) requiring countersignature of policies on risks located in the state, irrespective of whether the policies are made, written or placed in the state involved (App. 7); and (c) states (three) requiring countersigna-

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[3]See also Section 40-804 (App. 5) dealing with insurance other than fire and marine and imposing the tax "on risks in this state."

ture of policies on risks in the particular state in certain instances and on all risks in other instances, but in language other than that found (a) and (b) above (App. 8).

The policy of restricting the operation of the countersignature statute to risks made, written or placed in Idaho has now been changed.

Sec. 40-901 and Sec. 40-902, amended July 1, 1947, have eliminated the "in this state" limitation heretofore existing and with certain exceptions, policies, no matter where made, written, or placed, become subject to the act if made, written or placed on "risks or property located in the State of Idaho" (App. 5-6).

(c) The wording and meaning of the Idaho Statute as contrasted with the wording and meaning of the Montana and Virginia countersignature statutes, showing that the Idaho statute is clearly different and distinguishable.

The comparison of certain provisions of the Idaho countersignature statute and the provisions of the Virginia and Montana countersignature statutes emphasizes the differences in the provisions and the differences in the meaning of the Idaho law as distinguished from the Virginia and Montana laws. The differences between the facts of this case and the factual assumptions underlying the decision in the case of *Osborn v. Ozlin*, 310 U.S. 53, 84 L. ed. 1074, 60 S. Ct. 758, involving the Virginia countersignature statute, and the facts underlying the decision in the case of *Holmes v. Springfield Fire and Marine Ins. Co.*, 311 U.S. 726, 85 L. ed. 473, 61 S.

Ct. 129, involving the Montana countersignature statute, are also of significant importance and will be discussed herein.

The relevant portions of the Virginia Statute and Montana Statute will be found in the footnote.[4]

The principal differences between the Idaho statute on the one hand the Virginia and Montana statutes on the other are:

1. The Idaho statute by reason of the "in this state" qualification does not apply extra-territorially.

Both the Virginia statute and the Montana statute apply extra-territorially. The Virginia statute applies to "contracts of insurance on persons or property herein." By using the quoted words, Virginia clearly intended its statute to apply to all policies of Virginia risks irrespective of whether the policies are made, written or placed in Virginia or not.

The first part of the Montana statute, like the Idaho statute, provides that it is unlawful "to make, write, place * * * *in this state*" any policy of insurance upon any insurable risk resident, situated or located in the state. The Montana statute, however, contained additional provisions with respect to policies issued at its principal or department offices by an insurance company. This additional proviso read in part:

> "* * * provided that nothing in this Act shall be construed to prevent any insurance company * * * from issuing policies * * * at its principal or department offices, covering property * * * situated or located in this state; provided, how-

[4]See Appendix, p. 8-11.

> ever, *such policies* are issued upon applications procured and submitted * * * by a resident agent, who shall * * * countersign the same, and that said resident agent * * * shall receive the full commission on all policies when premium is paid." (Italics ours)

The effect of this additional provision is to make the Montana statute apply to policies on Montana risks irrespective of whether the policies are made, written or placed in Montana. These additional provisions give the Montana statute an extra-territorial application like the Virginia statute.

There are no provisions in the Idaho statute applicable to policies made, written or placed outside of Idaho. Provisions applicable with respect to home office issued policies were included in the original enactment of the Idaho statutes but were eliminated by amendment in 1911.

It is very likely that these additional provisions were originally included to make clear that Idaho recognized the propriety of the standard insurance practice of issuing policies at the home office, and wanted to safeguard this practice. When in 1911 Idaho recognized that such provisions might make its statute applicable to such policies on Idaho risks made, written or placed *outside of Idaho*, she eliminated them in order to make clear her original intent, consistent with the other provisions of the statute, to make it applicable only to policies on Idaho risks made, written or placed in Idaho.

2. The Idaho statute is made applicable only to foreign insurers.

The Virginia statute and the Montana statute apply to all insurers.

The distinction emphasizes the point that countersignature in Idaho of policies made, written or placed in Idaho is designed as a further means of securing to the citizens of Idaho the "valuable advantages secured in dealing with a company authorized by the state." Countersignature in Idaho of policies made, written or placed in Idaho *by an Idaho company* is not required to secure to the citizens of Idaho the advantages of dealing with a company authorized by the state. The Idaho law is silent on the subject of countersignature of policies made, written, or placed outside of Idaho either by a company domiciled in Idaho or by a company not domiciled in Idaho.

3. There is nothing in the Idaho statute which would prevent the Idaho agent from giving up entirely any commission which he might initially be entitled to with respect to business made, written or placed in the state or from sharing a commission which he was entitled to on such business, in any way he saw fit with any other party.

The Virginia statute contains a specific requirement to the effect that the resident countersigning agent

> "shall be entitled to and shall receive the usual and customary commissions * * * provided * * * the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding 50% of the resident agent's or agency's commission allowed on such business."

The Montana statute contains a provision reading in part as follows:

> "It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this Act; * * *"

This provision was cited by the Attorney General of Montana in his opinion of November 30, 1937 (32 F. Supp. p. 975) as authority for his ruling that the Montana agent was not permitted to make any rebate or share a commission with an out-of-state agent forwarding the policy for countersignature.[5]

It is interesting to note that the Montana statute upon which the *Holmes* decision was based was changed materially in 1941. The amended law contains a provision whereby the countersigning agent in Montana was to receive a commission of not less than 5% of the premium but this was subject to a qualification reading:

> "nor shall any of the provisions of this act apply to the business of mutual or stock insurance companies who solicit insurance by salaried representatives and upon which no commission is paid."

The Idaho statute contains no qualifications as to who the resident agent may be.

4. Section 40-902, I.C.A., provides:

> "* * * A resident agent shall countersign all policies so issued. * * *"

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[5]In brief for the appellees, pp. 34 to 36, on the first appeal, the statutory provisions of a number of states are analyzed dealing with the subject of the sharing of commissions. These provisions fortify our contention that it is valid to share or make other arrangements unless there is a specific prohibition against it.

Section 40-905, I.C.A., defines an agent as:

> "Any person who, for compensation or otherwise, solicits insurance * * * or in any manner aids in the transaction of the business of an insurance company."

There is no qualification whatsoever as to who the resident agent may be.

Thus, under the Idaho law, it is possible for a salaried representative of any company who had received a license as an agent to countersign a policy to the extent required by Section 40-902.

The Virginia statute contains the following provision:

> "No state agent, special agent, company representative, salaried officer, manager or other salaried representative of any regularly authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety * * * covering persons or property in this state."

5. Under the Idaho law, no service is required of the countersigning agent other than the simple ministerial act of affixing his signature, and such requirement is not needed to buttress other provisions of the Idaho law (See p. 39, *infra*) (See App. 6).

Under the Virginia statute as construed, the countersigning agent had an obligation to supervise the contents and form of the policy and to render services during the life thereof, both to the assured and the company, just as if he had negotiated the contract.

The Montana statute requires the countersigning agent to keep a record of all countersigned risks, to

the end that the state may collect its tax revenues. Since the effect of the various provisions of the Montana statute is to make it apply to all policies on risks located in Montana, there is nothing inconsistent in the proviso relating to countersignatures, which reads:

> "* * * to the end that the State may receive the tax required by law to be paid on premiums collected for insurance on all persons, property or other insurable risks resident, situated or located within this State; * * *"

This provision in and of itself differentiates the true meaning of the Montana statute from the Idaho statute.

A somewhat similar statement of purpose was eliminated from the Idaho statute in 1939. By its deletion Idaho recognized that the application of Section 40-902 did not parallel the application of its tax provision in Section 40-804 (see pages 28-31, *supra*) and that such a statement of purpose was inconsistent with the real intent and purpose of Section 40-902 to restrict the making, writing or placing in Idaho of any policy or contract unless done through a resident agent of Idaho.

In addition to the differences in the Idaho statute as contrasted with the statutes of Virginia and Montana, there are also the following important differences between the facts of this case and the facts of the cases in light of which the Virginia and Montana statutes were discussed:

1. The *Ware* case involves a writing of insurance on a no commission basis under the War Projects In-

surance Rating Plan. No commission was paid on any business written under that Plan.

In the Virginia case it was assumed that commissions were payable on all insurance business written. The War Projects Insurance Rating Plan, was, however, approved and used in Virginia during the war.

In the Montana case an actual commission of 10% was paid to an outside agent and a 5% commission paid to a resident agent. The opinion of the Attorney General of Montana as to the meaning of "full commission" was obviously rendered on the assumption that a commission would be payable on the insurance written.

2. Evidence in this case shows that Ware performed no services whatever other than countersigning, and that all services performed by the defendant companies were performed in exactly the same manner as they would have been performed whether or not the policies were countersigned (R. 232, *et seq.*)

In the Virginia case, the evidence showed that under the statute, as it was construed, the countersigning agent was required to perform services in supervising the contents and form of the policy and was required to render services during the life thereof, both to the assured and to the company, just as if he had negotiated the contract. This requirement of the Virginia law is entirely absent here, and this is an important difference.

It will be noted, therefore, from the contrasting provisions of the Idaho statutes on the one hand with those of the Virginia and Montana statutes on the other, as well as important differences in the facts in

the Virginia and Montana cases and in this *Ware* case, that the Idaho statute under consideration differs in very material and important respects from the Virginia and Montana statutes which were under consideration in the *Osborn* and *Holmes* cases.

One further matter might well be discussed at this point in developing more clearly the meaning of Section 40-902 of the Idaho Code Annotated, as amended. Reference is here made to the text of Section 40-902 as set out in the appendix of this brief. If the provisions of this statute are considered in light of the other provisions of the Insurance Code, it becomes apparent that countersignature found below to be a mere ministerial requirement (R. 89) performs no function in buttressing the other provisions of the Insurance Code. Section 40-906 (App. 11) provides that it shall be unlawful for any person to act within the state as an agent without a certificate of authority. This is in no way related to countersigning. Section 40-809 (App. 12) provides for the filing of an annual statement by all companies licensed to do business in the state with the filing authority. This statement incorporates provisions adequate for determination that the company is in such financial condition as to warrant continuance of its right to do business in the state. Section 40-1107 (App. 13) contains provisions prohibiting rebates. This is in no way related to countersigning. Section 40-804 (App. 5) requires the filing with the department annually under oath of a statement showing the amount of all gross premiums received by the company on risks in Idaho during the preceding year and the payment of tax thereon. This

is in no way related to countersigning. Section 40-708 (App. 16) contains provisions for examination of foreign companies. There are additional provisions in Section 40-711 (App. 16) relating thereto, and a provision in Section 40-712 (App. 17) with respect to impairment of capital. The countersignature requirement has no relation with reference to these statutes. Chapter 25 provides for the licensing of insurance adjusters. Countersignature requirements have no relation thereto. The Workmen's Compensation Act provides for approval of awards by the Industrial Accident Board. There are additional provisions in Section 43-1601 (App. 17) of the Compensation Act with respect to safeguarding the financial ability of companies which file surety bonds for employers. Countersignature requirements on policies have nothing to do with these provisions. Furthermore, Idaho has no law covering rates for bonds to secure the workmen's compensation obligations, and no law covering the rates which may be charged for compensation policies, which are entirely apart from the required bonds. Neither does Idaho have any laws requiring that rates for automobile liability or general liability be subject to approval. It is obvious, therefore, that countersignature performs no function in buttressing any of these statutes. These statutes are adequate standing by themselves, unaided by countersignature requirements, to perform the function that they were enacted to serve. They would not be one whit better administered if policies were countersigned, nor would they be one whit less efficiently administered if policies were not countersigned.

(d) The statute (Sec. 40-902) is not to be read into the plaintiff's contract as a part thereof, so as to confer a cause of action in favor of plaintiff against the defendants.

Assuming, for the sake of argument, that the statute should be interpreted in accordance with the plaintiff's contention as having extra-territorial effect, nevertheless the statute by its terms does not purport to impose liability on an insurance company in favor of a resident agent who countersigns bonds or casualty policies. The Idaho Code (Section 40-903, App. 20) merely provides a penalty for willful violation of Section 40-902, but no provision is made to confer a right of recovery on the countersigning agent. If it were intended to confer such a right of recovery on a countersigning agent, it would have been a simple matter to so provide when provision was made for sanctions to insure compliance with Section 40-902. Thus, in Iowa, it is provided by the Iowa Insurance Code, 1935, as amended by 1939 Session Laws, Chapter 28 S.F. 164, Section 6:

> "The resident countersigning agent shall have a direct claim against the insurance company issuing such policy, or contract of insurance or endorsement thereto for his commission in accordance with the two preceding sections. The liability of such company for such commission may be enforced in an action at law or equity as the case may be."

The fact that the Idaho law provides no such sanction but does provide a penalty for willful failure, indicates that no such sanction was ever intended. After all, it will be recalled that the countersignature

requirement was originally imposed in the language of the 1911 Amendment (Chapter 228, Idaho Laws 1911, p. 744)

> "to the end that the State may receive the tax required by law to be paid on the premium collected for insurance on all property located within this state."

The purpose was not the creation of a civil cause of action in favor of a countersigning agent. The state sought to protect its own tax revenues, whether the countersigning agent received a commission or not, and a penal sanction was an appropriate remedy to insure the collection of such revenues. The question of sanctions was not left to inference; it was a matter specifically considered, and—what is more important—specifically provided for by Section 40-903 (App. 20). Provision was even made for the civil collection of the penalty imposed. The fact that, contemplating the possibility of civil collection, the Legislature made no provision for civil collection by the countersigning agent on his own behalf, is the best possible evidence that the *sole* sanction provided was that provided in Section 40-903 (App. 20).[6]

The matter is one of legislative intention, and it by no means follows that if a penal statute has been violated a person claiming to be injured by reason thereof acquires a civil cause of action. See

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[6]That the legislature contemplated the possibility of civil sanctions, but only on behalf of the state, is further evidenced by Section 40-807 (App. 21) dealing with the civil collection of a penalty for failure to pay premium tax.

Hitson v. Dwyer (Cal.) 143 P.(2d) 952, holding that a statute making it a misdemeanor to sell alcoholic beverages to an obviously intoxicated person was not adopted for the benefit of an intoxicated person so as to give him a right of action for the violation of the statute.

Evers v. Davis (N. J.) 90 Atl. 677, holding that the Tenement House Act of 1904 is purely a public statute enforceable by specified penalties and evincing no legislative intention that in addition thereto the class of persons for whose protection it was enacted should have a private right of action resulting from a violation of its provisions.

Taylor v. L.S. & M.S.R. Co., 7 N.W. 728, and *Flynn v. The Canton Company*, 40 Md. 312, 17 Am. Rep. 603, holding that an action for damages will not lie against the owner of property abutting a sidewalk in a city on account of injuries occasioned by snow and ice thereon although he is required by city ordinance to remove snow and ice from the sidewalk, which he neglected to do.

In *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, which was an action by an insurance agent to recover commissions for countersigning services rendered under a statute similar to and almost identical with that herein involved, the court refused to permit plaintiff to recover under the statute in the absence of a contract for the compensation claimed. In other words, the court held that the statute alone even when coupled with a custom didn't confer a cause of action upon the plaintiff.

In his memorandum opinion the trial judge first held (R. 70):

> "If Ware was to receive this commission it must be found that he was entitled to it as a matter of law as the plaintiff's right is wholly dependent on the Statute."
>
> "* * * it is agreed that this action is prosecuted, not on the contract, but on the statute." (R. 73).

(R. 75):

> "It cannot be said that an agent is specifically given, under this section of the statutes, a right of action to recover and if the statute was to be so construed, that he does have a right of action, his right to recover is limited to the full commission that was paid to out of state agents in writing the policies."

The court has, therefore, found (pursuant to the mandate of this court to determine the matter under the local law) that under the Idaho law the statute on which the plaintiff relies does not give the plaintiff a cause of action in his favor. Accordingly, the plaintiff cannot recover *on this ground alone* regardless of the merits, if any, of his other contentions.

5. The defense of waiver of commissions by contract.

In the foregoing discussions, attention is called to the fact that under the agency contract the commissions payable on proposals secured by Eugene H. Ware were to constitute "full compensation for all services," including the countersigning services contemplated by Section 8 of that contract and Exhibit A-1 attached thereto. In addition, attention has heretofore been

called to the supplemental agreement evidenced by letter dated October 21, 1936 (Exh. 7, 22, R. 50, 120, 162), whereby defendants agreed to pay Eugene H. Ware and he agreed to accept the additional sum of $5 per month for his countersigning services. He rendered these services to the defendants, including countersigning services for the policies involved. As Mr. Peterson testified (R. 223):

"A He countersigned policies other than these.
THE COURT: He countersigned other policies?
A Yes sir, several policies."

(R. 164):

"Q Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for countersignature?
A They were.
Q That is on out-of-state business?
A Yes, sir."

The phrase "out-of-state business" merely meant business produced outside of Idaho on risks in Idaho (Ex. 22, R. 162, 163). For this small amount of countersigning service, defendants agreed to pay Eugene H. Ware, and he agreed to accept, the sum of $5 per month (Ex. 7, 22). Each month for 68 months (Ex. 6, R. 120) to and including May 31, 1942, defendants paid and Eugene H. Ware accepted the sum of $5 per month as contemplated for countersigning policies. The payment was made and accepted for May, 1942, for countersigning the three policies issued May 18, 1942, and the Idaho compensation bond May 14, 1942. Indeed, the May check was cashed June 3, 1942, without demur or objection after the first three policies and

bond were countersigned and the three policies mailed to the New York office of the defendants.

The court found (Finding IX, R. 88):

> "That the said Eugene H. Ware has been paid in full by the defendant for the countersigning services by him rendered."

No claim for additional compensation was made by Eugene H. Ware in connection with the countersignature of the first three policies and bond, either at the time of countersignature or at the time that the three policies were mailed to the New York office of the defendants, or at the time that the $5 check for countersigning services rendered for the month of May was cashed. It was only some time after the policies and bond were countersigned in May under the aforesaid $5-per-month contract that Eugene H. Ware raised any question with respect to the validity of that contract. That the contract is entirely valid has already been pointed out, but it might be well to again call attention to the one case in the country that has considered the validity of a contract under a statute similar to that of Idaho, which case has upheld the validity of the contract.

In *Birdsall-Friedman Co. v. Globe & Rutgers Inc. Co.* (Pa.) 190 Atl. 924, a countersigning agent sought to recover commissions on home office policies which he had countersigned under the Pennsylvania law. The Pennsylvania statute (App. 22) is substantially identical with the Idaho statute, Section 40-902, the differences having no bearing upon the principles adopted in that case. The question of the necessity of an agreement for commissions for countersigning

home office policies as being a condition precedent to a right of recovery was then discussed. The court said, p. 927:

> "(3) The requirement of article 5, §501, of the Act of 1921 (40 P.S. §631), *supra*, adds nothing to the rights of the plaintiff. *We cannot agree* with the contention of plaintiff that *the provisions of the act, coupled with a certain trade custom*, require the payment of a 10 per cent commission, in the absence of an expressed understanding to that effect. The argument of the plaintiff would be more persuasive if the act specified the rate of commission to be collected. The absence in the act of a specific requirement concerning the rate to be paid permits the parties to fix for themselves the rate of commission and method of payment. There is no requirement of public policy preventing the parties from so grading the rate of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well. The primary legislative purpose was to secure the payment of taxes due the commonwealth, and here there are no taxes shown to be in default." (Italics ours)

It is obvious, therefore, that under the provisions of the agency contract, particularly Section 8, and Exhibit A-1 attached thereto, and under the supplemental $5-per-month contract, the parties had made a valid contract for the compensation to be paid the countersigning agent.

The court below in his opinion (R. 75) stated:

> "There was nothing unlawful in Mr. Ware making the contract with the defendant compan-

ies that he would countersign the policies at five dollars per month."

In his findings, paragraph IX, R. 87, he also so found.

6. The Idaho resident agency statute involved (Sec. 40-902) if construed in accordance with the plaintiff's contentions, violates the United States Constitution and is, therefore, invalid.

(a) The constitutional questions are still in the case.

If this court, contrary to the Trial Court, should accept the plaintiff's contentions that under the local Idaho law appellant is entitled to recover, then it is appropriate to again raise the constitutional questions raised by the defendants below (R. 55, 114).

The case of *Ware v. The Travelers Ins. Co.*, 150 F. (2d) 463, was decided on a motion to dismiss, unaided by an interpretation of the local Idaho law, and unaided by a consideration of how the statute actually operates in practice. At the time of the decision by the Circuit Court of Appeals, the important cases of *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 90 L. ed. 1023, 66 S. Ct. 1142; *Robertson v. People of the State of California*, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160; *Freeman v. Hewit*, 329 U.S. 249, 91 L. ed. 265, 67 S. Ct. 274, and other cases had not been decided. Had they been decided, the decision of the Circuit Court of Appeals might well have held Section 40-902 vulnerable to the XIVth Amendment to the Federal Constitution and to the Commerce clause.

The doctrine of the law of the case is not an absolute rule of law, but merely one of practice, procedure

and convenience. *Messinger v. Anderson*, 225 U.S. 436, 32 S. Ct. 739. Nor does the doctrine bar the appellate court from passing on questions not considered in the prior appeal. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 41 S. Ct. 276. Especially is this true where substantially different facts are presented at the second trial. *Mitchell v. Reolds Farms Co.* (Mich.) 247 N.W. 89. The doctrine may be disregarded by the appellate court if it believes its prior decision to be palpably erroneous. *American Surety Co. of N. Y. v. Bankers' Savings & Loan Assn. of Omaha, Neb.* (C.C.A. 8) 67 F.(2d) 803. Certainly an appellate court upon second appeal is not bound by a proposition of law laid down in a prior appeal where a contrary rule has been announced by the Supreme Court of the United States after the first appeal. *Pacific American Fisheries v. Hoof* (C.C.A. 9) 291 Fed. 306; *American Surety Co. v. Bankers' Savings & Loan Assn., supra.* We believe, for example, that the case of *Robertson v. People of the State of California*, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160, decided since the first appeal in the *Ware* case, announces principles which demonstrate the unconstitutional character of the statute involved.

(b) The statute conflicts with the XIVth Amendment.

Before the constitutionality of Section 40-902 can be passed upon, we must first know what the statute is and means. If the statute means what the plaintiff claims it means, so as to entitle the plaintiff to recover commissions, then it is assumed that the statute means: (1) that Section 40-902 applies to insur-

ance proposals originating and negotiated outside the state of Idaho; (2) that "full commission" payable to a countersigning agent means commissions customarily paid in Idaho or, alternatively the same commission as would be payable to a producing agent if he produced the business; (3) that a commission is payable even though the policies are written on a no-commission basis under the War Projects Rating Plan; (4) the obligation to pay a countersigning agent applies only to a foreign insurance company; (5) a foreign insurance company cannot agree with a countersigning agent relative to the compensation to be paid him for his countersigning services; (6) the countersigning agent had no right to share the full commission or to make any arrangements with respect thereto, even though the statute did not prohibit him from so doing; (7) the countersigning agent has a direct cause of action for "the full commission."

The following features of Section 40-902 are now to be noted:

1. It applies *only* to foreign insurance companies.

2. Domestic insurance companies need not have policies countersigned.

3. No service is required of a countersigning agent other than the ministerial act of countersigning (R. 89); *i.e.*, (1) no approval of the risk is required (provision as to approval of risk having been eliminated in 1915 by Chapter 145, Idaho Laws 1915, p. 318); (2) no record of policies countersigned need be kept or furnished to any state insurance authority. (Under the statute effective July 1, 1947, important services are required of the countersigning agent) (App. 6).

4. The statute is not related to and is in no way necessary to a proper administration of the other regulatory provisions of the Idaho law.

5. The period involved, during which the cause of action allegedly arose, is prior to the enactment of the McCarran Act, by which Congress empowered states to regulate insurance in their respective states.

The following additional comments should be borne in mind if the statute means what the plaintiff claims it means:

1. Countersignature is mandatory, whether the policies be written pursuant to negotiations originating outside or within the state of Idaho.

2. The sole beneficiary of the statute is the countersigning agent; in countersigning he performs no function in the Idaho insurance system. He neither services the policies he countersigns nor protects the revenues of the state.

3. The net effect of the statute in practice is to favor domestic insurance companies and discriminate against foreign insurance companies in the writing of insurance on risks located in Idaho because the foreign insurance company must pay a commission to the producing agent and another "full commission" to the countersigning agent, whereas a domestic insurance company need pay a commission only to a producing agent.

4. The countersignature commission requirement therefore constitutes a bald exaction for a trifling service directed solely against a foreign insurance company as to policies made, written or placed outside the state of Idaho.

5. The net effect of the statute in practice is to prohibit a foreign company from writing insurance outside of Idaho on risks located in Idaho.

Bearing in mind the several features of the Idaho statute as discussed above, we turn to a consideration of the applicable constitutional principles involved. The Constitution, being the "supreme law of the land" (Article VI, Clause 2), invalidates Section 40-902 if it deprives the defendants of their liberty or property without due process of law or denies the defendants equal protection of the law (Constitution, XIVth Amendment, Section 1).

Hyatt v. Blackwell Lumber Company, 31 Ida. 452, 173 Pac. 1083 (1918) 1 A.L.R. 1663;

Liggett Co. v. Baldridge, 278 U.S. 105, 73 L. ed. 204, 49 S. Ct. 57;

Northwestern Natl. Ins. Co. of Milwaukee, Wis. v. Lee, 49 F.(2d) 274 (3-Judge court sitting in Oregon) affirmed sub. nom. *Averill v. Northwestern Natl. Ins. Co. of Milwaukee* (Wis.) 284 U.S. 590, 76 L. ed. 509, 52 S. Ct. 139;

2 Cooley's Constitutional Limitations, 8th ed., p. 1229;

23 Am. Jur. p. 230, Secs. 259, 265, 275;

11 Am. Jur. p. 646, Sec. 40 *et seq.*, p. 995, Secs. 261, 262, 263;

12 Am. Jur. p. 134, Sec. 472.

Robertson v. People of the State of California, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160, 1163.

In the case at bar, a violation of both the due process and equal protection clauses exists. Section 40-902 is arbitrary in that it compels a foreign insurance company under the statute as claimed applicable to the facts of this case to pay a resident of Idaho for services which he does not in fact render and is not required to render, the payment being wholly out of proportion for the mere ministerial and trifling act of affixing his signature. In addition, the statute operates unequally, without any basis in reason for the classification, the countersignature requirement being imposed upon the foreign insurance company only and not against the domestic insurance company. (See especially the *Hyatt* and *Northwestern* cases, *supra.*)[7]

The appellant relies on *Osborn v. Ozlin*, 310 U. S. 53, 84 L. ed. 1074, 60 S. Ct. 758, upholding the validity of the Virginia resident agency law, and *Holmes v. Springfield Fire and Marine Ins. Co.*, 311 U. S. 726, 85 L. ed. 473, 61 S. Ct. 129, upholding the validity of the Montana law.

We have heretofore pointed out the important dis-

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[7]See also *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. ed. 832, 17 S. Ct. 427; *New York L. Ins. Co. v. Head*, 234 U.S. 149, 58 L. ed. 1259, 34 S. Ct. 879; *Aetna L. Ins. Co. v. Dunken*, 266 U.S. 389, 69 L. ed. 342, 45 S. Ct. 129; *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 70 L. ed. 664, 46 S. Ct. 331; *Home Ins. Co. v. Dick*, 281 U.S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701; *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928; *Boseman v. Connecticut General L. Ins. Co.*, 301 U.S. 196, 81 L. ed. 1036, 57 S. Ct. 686, 110 A.L.R. 732.

tinguishing differences between the Idaho statute here involved and the Virginia and Montana statutes there involved. (See Br. 31, *supra*).

There is an additional reason supporting the contention that Section 40-902 violates the due process clause. The Supreme Court has held that a corporation cannot, in view of the due process clause, be prevented from employing and paying those whom it needs for its business outside the state, even though with reference to state insurance risks. (*Fidelity and Deposit Co. of Maryland v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331.) What it cannot do directly, a state cannot do indirectly. Otherwise, there would be little protection for a constitutional right (*Fidelity and Deposit Co. of Maryland v. Tafoya, supra*). If, under Section 40-902, the defendants are required to pay the "full commission" to the resident agent, they cannot pay any commission to the agent that produces the business. On the other hand, if it is argued that the defendants can pay a commission to the producing agent but are required to pay the same commission to the countersigning agent and that therefore there is no prohibition within the meaning of the *Tafoya* case, the effect is just as bad, because the defendants cannot compete with a domestic company in writing insurance policies on Idaho risks. Commissions must be included in the premiums charged. If a foreign insurance company must pay two full commissions, whereas a domestic company need pay only one, a foreign company is in no position to quote competitive rates. Accordingly, Section 40-902 denies the

defendants due process.[8] Again, if Section 40-902 means that the entire commission must be paid to the countersigning agent and therefore nothing to the producing agent, the statute denies defendants due process under the doctrine of the *Tafoya* case, and the statute is void.

In the opinion in the case of *Ware v. The Travelers Ins. Co., supra,* the *prima facie* constitutionality of the Idaho statute was upheld on the strength of the *Osborn* and *Holmes* cases, both of which have been distinguished above, but in doing so, the court did not take into account the meaning of the Idaho statute as now construed. Now the court can determine the constitutionality of the statute in light of its true meaning.

(c) The statute conflicts with the commerce clause of the United States Constitution.

In the case of *U. S. v. S. E. Underwriters Assn.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440, the court, for the first time, held that the business of insurance constitutes interstate commerce. Under the

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[8]In *Potomac Fire Insurance Company v. State*, 18 S. W.(2d) 929, 933, it is stated that:

"The expense of agents' commissions is the largest single item of expense in the business of insurance." In *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U.S. 251, 75 L. ed. 324, 328, it is said that: The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or impairment of the financial stability of the insurer."

McCarran Act (approved March 9, 1945) Congress empowered the states to regulate and tax the business of insurance. In *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 90 L. ed. 1023, 66 S. Ct. 1142, the court was called upon to pass on the validity of the South Carolina statute imposing a gross premium tax upon a foreign insurance company, there being no similar tax placed upon a domestic insurance company. In upholding the statute, the court relied solely upon the provisions of the McCarran Act, which authorized the difference in treatment taxwise imposed by the state. In the companion case of *Robertson v. People of the State of California*, 328 U. S. 440, 90 L. ed. 1040, 66 S. Ct. 1160, the court upheld the California statute prohibiting any insurance company not on a legal reserve basis from engaging in interstate commerce through local agents in writing risks on persons located in California. The McCarran Act was not involved, the cause of action having accrued prior to the passage of that Act. The court was careful to note, however, in the course of its opinion, that the California statutory requirements applied to all insurance companies, whether domestic or foreign (See L. ed. pp. 1043, 1044, 1045, 1047, 1048, and 1050). On p. 1050 the court said:

> "Here California's reserve requirements for securing authority to do business cannot be held, either on the face of the statute or by any showing that has been made, to be excessive for the protection of the local interest affected; or designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities, by all who are able and

> willing to maintain reasonable minimum reserve standards for the protection of policyholders."

It is to be noted, therefore, that the test to be applied is whether Section 40-902 can be said to be "*excessive for the protection of the local interest affected,*" or if the statute is "*designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities.*"

It is apparent from what has already been said that Section 40-902 is both excessive and discriminatory. It is excessive because it constitutes a bald exaction for a trifling service, with no protection to the state resulting therefrom or to its insurance system—unless it be a statute enacted for the benefit of the countersigning agent alone. The statute is discriminatory because it discriminates—on its face as well as in practice—against a foreign insurance company only, leaving the domestic company free of the burden thus imposed upon the foreign company (R. 90). In recent years the Supreme Court has reaffirmed the constitutional necessity of not burdening or discriminating against interstate commerce. In *Best & Co., Inc. v. Maxwell,* 311 U. S. 454, 61 S. Ct. 334, the court said, at p. 335:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In that case, a North Carolina statute required one not a regular retail merchant to obtain a $250 license

to enable him to display goods for purposes of securing orders for retail sales. A New York merchandising establishment rented a display room for several days and took orders for goods corresponding to samples, which orders were filled by shipping to customers from New York City. The regular North Carolina merchants were subject only to a $1 license tax for the privilege of doing business. The effect of this discriminatory treatment was to favor local merchants against foreign merchants and undoubedly increased the economic welfare of the local merchants. In holding that the statute was in violation of the commerce clause, the court noted the competitive situation as between domestic and foreign merchants, and said (p. 335):

> "Interstate commerce can hardly survive in so hostile an atmosphere. A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market * * * North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.
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> "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."[9]

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[9]See also *Northwestern Nat. Ins. Co. v. Lee*, 49 F. (2d) 274, affirming *sub. nom. Averill v. N.W. Nat.*

Another case calling attention to the fact that a state statute enacted for the local economic welfare of a class of persons within the state does not thereby void the invalidating effect of the commerce clause is *Baldwin v. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497. In that case, a provision of the local milk control act prohibited a dealer from selling within the state, milk produced without the state where such milk was purchased from the producer at less than the minimum price fixed for similar milk produced within the state. A dealer brought wholesale milk from Vermont into New York and there sold it in the original cans. In holding that the state statute was unconstitutional as an undue burden on interstate commerce, Judge Cardozo said, at 55 S. Ct. p. 500:

> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income * * * Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to com-

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Ins. Co., 284 U.S. 590, 76 L. ed. 509, 52 S. Ct. 139, heretofore discussed. Also *Best & Co., Inc. v. City of Omaha* (Neb.) 33 N.W.(2d) 150, decided June 29, 1948.

> merce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Then, discussing a number of decisions showing permissible regulations, the court concluded, at p. 501:

> "None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states."[10]

In *Southern Pac. Co. v. State of Arizona*, 325 U. S. 761, 65 S. Ct. 1515, the court held invalid under the commerce clause the Arizona train limit law, limiting passenger trains to fourteen cars and freight trains to seventy cars. The court said, at p. 1525:

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[10]See also *Nippert v. Richmond*, 326 U.S. 416, 66 S. Ct. 584 (1946), invalidating tax (as an undue burden on interstate commerce) imposed on sales solicitors for out of state concerns.

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power'."[11]

In *Edwards v. California*, 314 U. S. 160, 62 S. Ct. 164, the court held a California statute violated the commerce clause by making it a misdemeanor to bring or assist in bringing in to the state an indigent nonresident, the local welfare not being a sufficient excuse.

In *Freeman v. Hewit*, 329 U. S. 249, 67 S. Ct. 274, the court invalidated the Indiana gross income tax Act of 1933, calling attention to the fact that the commerce clause, even without implementing legislation by Congress, is a limitation upon the power of states forbidding the state from singling out interstate commerce for hostile action, and, furthermore, precluding the state from any action which "may fairly be deemed to have the effect of impeding the free flow of trade between states." The court said (67 S. Ct. p. 277):

> "Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own."

If, therefore, the commerce clause is effective to

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[11] *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 90 L. ed. 982 (1946) 66 S. Ct. 1050, invalidating state statute requiring segregation of passengers on trains.

strike down a statute passed for the purpose of protecting the local economic welfare—whether it be by taxation, or protection against nonresident indigent immigrants, safety of train operation within the state, or protection of local commerce against the competition of foreign commerce—surely a state statute which has for its sole function and purpose the arbitrary enrichment of a local resident at the expense of foreign commerce will likewise be struck down.

In the *Ware* case, the court, at 150 F.(2d) p. 464, treats Section 40-902 as a valid regulation of interstate commerce by reason of what is characterized as "the local servicing of policies" because "intimately bound up with the state's program for the security and welfare of workmen." The court cites, in a footnote, the statutes of Idaho which it believes impose this local servicing obligation. Reference to the statutes (40-508, 40-902, 40-903, 43-1601, 43-1604, 43-1605 and 43-1606) (App. 22-3) *fails to reveal a single statute that imposes upon a countersigning agent the duty of servicing the policies countersigned.* The protection of workmen is achieved by the bond and the servicing of claims within Idaho under the Workmen's Compensation Act is subject to approval of awards by the Board and to the licensing of adjusters. The countersigning agent has nothing whatsoever to do in this process (Finding XI, *n*, R. 89). The evidence in this case shows that Mr. Ware performed no service whatsoever in the servicing of the policies involved or in connection with the claims under those policies. Mr. G. M. Jordan, the defendants' Claims Department representative, testified fully as to how

the policies were serviced and how claims were taken care of (R. 232, *et seq.*). As a matter of fact, the claims involved required servicing in all parts of the United States. Obviously, Mr. Ware or any other countersigning agent couldn't possibly have had the facilities to service any such claims (R. 236). As stated by Mr. Jordan (R. 234-5):

> "At one time there was better than twenty-five thousand coming from all over the United States, and they started to dissipate all over the United States because of injury, and it was necessary to service their claims, and we referred the claim to the nearest offices to their home. We just followed the men."

Admittedly, a state may regulate either the intrastate or interstate aspects of the insurance business, but, as pointed out in the case decided since the *Ware* case, namely, *Roberston v. People of the State of California*, 328 U.S. 440, discussed *supra*, permissible regulation must not be "excessive for the protection of the local interest affected; or designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities."

The effect of Section 40-902 as construed by the plaintiff is to bar out-of-state insurers from competing with domestic insurance companies, as to policies made, written and placed outside of Idaho on Idaho risks, because the foreign insurance company must pay a countersignature commission when none is payable by a domestic company. *The court below in effect found the existence of discrimination against interstate commerce* (R. 89-90).

The Idaho statute, when tested by the rule of the *Robertson* case, is clearly in conflict with the test thus proposed, and, therefore, in violation of the commerce clause.[12]

It is respectfully submitted, therefore, that Section 40-902, if construed in accordance with the contentions of the plaintiff in light of the applicable constitutional principles—particularly the cases most recently decided—violates the Federal Constitution and is void. If void, the plaintiff has no basis for recovery.

7. Reply to appellant's brief.

(a) Criticism of appellant's statement of the case.

Unfortunately, appellant's statement of the case (Ap. Br. 1 to 18) is inadequate, incorrect and biased. At least twenty-seven illustrations are available to show this. To avoid unduly prolonging this brief, we call attention only to the following:

(Ap. Br. 5) Appellant is critical because appellees did not accept appellant's abbreviated record. Appellant's abbreviated record in light of the statement of

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[12]The protection afforded by the XIVth Amendment is, as pointed out above, an additional reason for the statute's invalidity because, as stated in *Mayer v. State of Nebraska*, 262 U.S. 390, 43 S. Ct. 625, the liberty protected by constitutional Amendment XIV "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." In Cooley's *Constitutional Limitations*, 8th ed., p. 1236-7, it is stated:

"Freedom is the general rule and restraint can be justified only by exceptional circumstances."

points, as set out R. 266, was an extremely biased and unfair document. A careful analysis made by us of that record showed nearly 175 items that would have required correction in the judgment of the appellees in order to present a fair statement of what occurred at the trial below. Under the rule, appellees had no other alternative but to demand a complete record. If there is any incidental duplication resulting from that demand it was caused by the biased and unfair abbreviated record submitted for approval.

(Ap. Br. 6) The purported summary of the $5 per month countersigning contract is inadequate and inaccurate. The court's finding on the matter (R. 87 and Finding IX) based on evidence, as for example Exhibits 6, 7, 22 is ignored.

(Ap. Br. 6) Appellant's quotation of Ex. A-2 with portions which appellant italicises constitutes a misconstruction of Ex. A-2 directly contrary to the finding of the court (Finding VI, *n*, R. 86).

(Ap. Br. 7) Appellant's discussion of Exh. 1 will be dealt with hereinafter in which the evidence showing that the War Projects Insurance Rating Plan endorsement was attached to the policy and was part of it from the beginning will be reviewed. Furthermore, the court so found (Finding VI, *n*, R. 82):

> "That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan."

The attempt to summarize Mr. Peterson's testimony is very unfair as will be shown in connection with the

discussion of the evidence showing that the endorsement was on the policy when it was issued.

(Ap. Br. 8) Oscar W. Nelson was not produced by defendant, as stated in appellant's brief, but was produced as a witness on behalf of appellant by appellant. Appellant omits the vital part of the witness Nelson's testimony elicited on cross-examination: That it is customary practice in Idaho for insurance commissions to be regulated by contract (R. 112) and that the rate of commission varies with the size of the policy or risk; that it goes down as the size of the risk goes up and that it varies with the various companies (R. 111). The court found that compensation to procuring agents is customarily fixed by contract between the insurance carrier and the agent on terms and conditions mutually satisfactory to each (Finding XIII, *n*, R. 90).

(Ap. Br. 8) Appellant ignores entirely the record of R. 115 to 130 dealing with admissions made by appellant dealing with Exhibits 6 to 17, inclusive, dealing with the $5 per month checks, the $5 per month letter, various documents involved with respect to the War Projects Insurance Rating Plan; letters dealing with the taxes paid on premiums returned to the Idaho authorities.

(Ap. Br. 8 and 9) Appellant ignores Mr. Peterson's testimony as to the origin of the three policies written under the Plan (R. 137). At the top of page 9 appellant cites certain sections of the statute. The witness made no attempt so to do and these sections of the statute do not embody the administrative practice to which he testified.

(Ap. Br. 9) Appellant characterizes the plan as a scheme for big companies to get the insurance business theretofore obtained by nonstock companies. The Government was attempting to get insurance at cost and without profit to the insurance carrier and to avail itself of the facilities of both stock and nonstock companies. The plan was practically world-wide in operation (R. 133 to 137). See discussion *infra*. There is also an inference that the witness was unethical in participating in the administrative committee set up by the War Department at the same time being secretary of the defendant companies. Appellant's statement ignores the fact that the committee on which the witness served was set up by the War Department (R. 136, 199) and expressly provided for representatives from mutual and stock companies. The witness merely represented the defendants. Other persons represented other companies (R. 200). There is also a sly inference of impropriety in the statement that the witness contacted officials in Washington, D. C., about this business. So far as concerns contacting the government, the contact was only for the purpose of getting information necessary to bid on the insurance (R. 139).

(Ap. Br. p. 11) Appellant ignores testimony that if the business had been made, placed and written in Idaho, the agent couldn't have gotten a commission under the Plan (R. 172). Appellant fails to point out that the testimony is that the defendant's countersigning practice was to require countersignature irrespective of local law (R. 173) (Ap. Br. p. 11). Appellant's reference to Exh. A to 0 merely shows

the relationship between the insurance advisor and the insurance company after the insurance was written. The criticism about the advisor's representative being also on the payroll of the Walter Butler Company is intended merely to again muddy the waters. There is no evidence that the defendants had anything whatsoever to do with that fact, nor is there any evidence that the Walter Butler Co. and the Acme Brokerage Co. weren't aware of and disapproved the arrangement (Ap. Br. 11). Appellant's statement concerning why the insurance company wrote the policy and the indemnity company put up the bond is incorrect. The testimony is that the writing of the bond was done pursuant to the requirements of law. There is no requirement of law relating to the writing of a compensation policy.

(Ap. Br. p. 13) Appellant's discussion of Exh. 7 ignores Exh. 22, (R. 162). Appellant's discussion of the payments ignores the fact that there were as many checks as there were months in which Ware countersigned (Exh. 6) and that the court found (Finding IX, R. 88) "That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered."

(Ap. Br. pp. 15, 16) Appellant's summary of Mr. Jordan's testimony ignores his testimony that Ware had nothing to do with servicing the policies involved (R. 234). The court so found (Finding XI, *n*, R. 89).

(Ap. Br. pp. 16, 17) Appellant's summary of Mr. Nelson's testimony ignores his testimony that only 10% was paid to the producing agent, 17½% payable to the general agent, being inclusive of that amount

(R. 263, 264) (Ap. Br. 17). Appellant's summary of the court's opinion is wholly inadequate picking out certain parts of that opinion and making no attempt to show the court's final findings and conclusions with respect to certain items contained in that opinion.

The foregoing review shows that the appellant's statement of the case wherever made must be received with extreme caution.

(b) Contentions considered.

Appellant interweaves various contentions under various headings and from time to time repeats her argument. It is our intention to answer each of the arguments advanced by discussing them under separate headings. Accordingly, this we proceed to do.

1. The contention that salaried agents are prohibited by Idaho Statute.

Appellant contends (Ap. Br. 19) that the Idaho Statute provides that it is only the one who gets a commission who can countersign. He relies solely upon *Osborn v. Ozlin*, 27 F. Supp. 71, to support this contention. However, that case dealt with the Virginia Statute, Sec. 4222. *Unlike* the Idaho Statute, the Virginia Statute contains the following express provision:

> "No state agent, special agent, company representative, salaried officer, manager or other salaried representative of any regularly authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety * * * covering persons or property in this state."

Obviously, the *Osborn* case does not support appellant's position as to the meaning of the Idaho law.

Under the Idaho law an insurance agent may be either a salaried or commissioned agent (Sec. 40-905, Br. p. 17, 15). The method of compensation is not regulated by statute and is left to the parties to determine by their agreement (R. 90).

While it is true that Sec. 40-902 provides for the payment of "the full commission" in the field in which it operates, that merely means "the full commission, if any" (See Br. pp. 16-23, *supra*). In fact, a number of foreign mutual companies in Idaho write policies through salaried agents (R. 182-186, 246-254, 262, 263). Consequently, both the interpretation of the statute and the actual practice show quite clearly that the Idaho law permits salaried agents both to write insurance and to countersign where the Idaho statutes are applicable.

2. The contention that all questions have been resolved in plaintiff's favor by the case of *Ware v. Travelers Ins. Co.*, 150 F.(2d) 463.

Appellant's contention (Ap. Br. 26, 27) that all questions here involved have been decided in appellant's favor in the case of *Ware v. Travelers Ins. Co.*, 150 F.(2d) 463, was advanced below and expressly rejected by the trial court (R. 72).

3. The contention that the contract of October 1, 1936, fixes the rate of recoverable commission.

Appellant contends (Ap. Br. 35, 36) that the October 1, 1936, contract fixes the rate of commission in the case of workmen's compensation policies to

10% of the premium. We have heretofore called attention to the fact (Br. p. 11, *supra*) that the basic agency contract (Exh. A, R. 16-21) was amended, effective June 1, 1940 (Exh. A-2, R. 23) to provide that upon the occurrence of any one of three different conditions, namely, (1) on risks, written on a retrospective or special commission basis, (2) on risks, or portions of risks, which are in states other than that indicated in the territory described in your agency agreement, and (3) on bonds involving execution or countersignature by another agent "the commissions which you may retain out of premiums paid to the company will be fixed on the basis of the individual risk, anything in your agency agreement to the contrary notwithstanding."

Appellant contends (Ap. Br. 35, 36), that Exhibit A-2 is inapplicable here because it is to be read so as to confine the type of retrospective or special commission risks to those risks, or portions of risks, "which are in states other than that described in your Agency Agreement."

Such a reading ignores the plain meaning of the contract. Had appellant's construction been intended, no comma would have been placed after the word "basis."

Furthermore appellant's interpretation creates two absurdities: (1) on retrospective or special commission basis risks Ex. A-2 would apply only on that minor part of such business which is located, in whole or in part, outside of the agent's territory, even though there is just as much reason—because of the reduced over-all premium on such risks—for Ex. A-2 to apply within his territory; and (2) Ex. A-2 would

be limited so as to apply only to retrospective or special commission basis risks, even though there is just as much reason under Appellant's own reasoning to apply it to prospective risks, and notwithstanding the fact that a statute might fix the commission in the state wherein the risk or portion thereof was located.

The obvious meaning of Ex. A-2 is (1) that it applies to all risks written on a retrospective or special commission basis, whether located within or without the agent's territory, and (2) that it applies to all risks or portions thereof, retrospective or prospective, which are outside of the territory described in the agent's contract. The Trial Court's findings support appellees' position (R. 86).

4. The contention that "full commission" means the commission payable if the insurance was procured by Ware and written without the War Projects Insurance Rating Plan.

We have heretofore pointed out that the phrase "the full commission" contained in Section 40-902 means the full commission, if any there be payable in connection with the securing of insurance proposals. It does not mean contract commission or customary commission, especially if there is no evidence of contract commission or customary commission (Br. p. 21, *supra*). We have also pointed out that the Montana Attorney General's interpretation of the Montana law referred to in *Springfield v. Fire & Marine Ins. Co.* is not a correct construction of the Idaho law; but even if it were, had Ware produced the business, no commission would have been payable because the policies were written under the War Projects Insur-

ance Rating Plan (R. 172). In the *Holmes* case an actual 10% commission was payable and paid to an outside agent. In this case no commission was payable or paid on policies written under said rating plan.

Appellant cites a number of cases purporting to support her position as to the meaning of "full commission." Actually the cases do not involve interpretation, but rather constitutionality of the statute involved in such cases (Ap. Br. 30, 32, 55, 56). Also cited are decisions holding that laws existing at the time of making of a contract are read into it. We do not disagree, nor did the trial court disagree (R. 76). The court said (R. 75-6):

> "* * * the Court is unable, after reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid."

Appellant suggests in passing that in any case he is entitled to 5% of the premium (Ap. Br. 30). He apparently now relies on that section of the statute which provides that when a policy is made, written or placed by a licensed broker, the contracting agent shall receive a commission of not less than 5% of the premium paid (R. 71).

In the court below the court said concerning this section of the statute (R. 71):

> "(The part underlined is the amended portion of the Statute and plaintiff alleges in his complaint that the policies 'were submitted to the plaintiff by the defendants and not through a

licensed broker,' and agrees that the amended portion of the statute has no application here.)"

Appellant apparently abandons the concession he made below and now contends that the section does have application. Not only, however, is there no evidence that the policies were submitted by a licensed broker, the complaint is on a precisely opposite theory (R. 87, Finding VIII, *n*). Furthermore, the only licensed brokerage law in Idaho at the time that the policies were countersigned were fire insurance brokers. Since there is no fire insurance policy involved, it is obvious that the statute has no application (See p. 24, *supra*).

5. The contention that the War Projects Insurance Rating Plan was inapplicable and illegal.

The court below found it unnecessary to pass upon the legality of the War Projects Insurance Rating Plan. As he construed the statute. the plaintiff had no cause of action. It thereupon became unnecessary to determine whether or not the War Projects Insurance Rating Plan was legally valid. Furthermore, he might have had in mind the fact that the right of an agent to compensation is derivative depending upon the transaction actually entered into or recognized by his principals.

See

MacGregor v. Persha (Minn.) 218 N.W. 463;
Lawson v. Black Diamond Coal Mining Company, 53 Wash. 614, 102 Pac. 759.

The state was asserting no objection nor were the parties to the insurance contract asserting any objection. If commissions were payable they were payable

on the transaction actually consummated, not upon a transaction not consummated.

Analogies make this principle plain. Thus, where parties treat a transaction as valid even though it is invalid under the statute of frauds, the broker is entitled to a commission. *Dworski v. Lowe* (Conn.) 92 Atl. 112. Or where policies are cancelled, the agent's commission is not based upon the original premium charged and paid, but upon the amount of earned premium.

National Union Fire Ins. Co. v. Nevils (Mo.) 274 S.W. 503;

Independent Indemnity Co. v. Dreyfus (C. C.A. 6) 49 F.(2d) 599;

Union Mut. Casualty Co. v. Insurance Budget Plan, Inc. (Mass.) 195 N.E. 903;

Aetna Life Co. v. Moser, 189 Wash. 521, 65 P.(2d) 1277.

Indeed, appellant's contract so provides (Par. 5, R. 18).

See also the analogy. *Commissioner of Internal Revenue v. Bradley* (C.C.A. 6) 56 F.(2d) 728.

The court correctly held that the plaintiff had no cause of action and that it was, therefore, unnecessary in this case to consider the question of the legality of the plan.

However, in view of the appellant's claim that the War Projects Insurance Rating Plan was inapplicable and illegal, we deem it helpful to consider that contention.

(1) Background and development of War Projects Insurance Rating Plan.

Stock casualty companies, as a rule, solicit their regular business through licensed agents and brokers who are generally recompensed for their services in the production of business, by a commission which is generally a percentage of the premium and they are sometimes recompensed for other services by flat amounts. Most of the large mutual casualty companies which are the writers of large workmen's compensation and automobile and general liability risks solicit their regular business through licensed agents who are salaried employees and who are recompensed through salary for their services in the production of business.

Previous to the adoption of the War Projects Insurance Rating Plan, the United States Navy and the United States War Department and other governmental agencies had been compelled to require that prime contractors on cost-plus-a-fixed-fee projects get four bids for the insurance required, two from stock companies and two from mutual companies. The prime contractor on each project was then required to place his insurance in the lowest bidding company (R. 134). There were two serious evils in this previous plan. One was that the contractor could not select the carrier which he believed was well suited or best suited to handle the insurance for his project and was compelled instead to use a carrier, even though that carrier was totally unqualified for the job, if the bid of that carrier were the low bid. The second was that at a time of greatest need a considerable part of the total insurance resources of the country might have

been unavailable because of a price differential, no matter how small or how large.

Many of the cost-plus-a-fixed-fee projects of the various governmental agencies were vast in size. Geographically they were located wherever in the United States and elsewhere in the hemisphere or throughout the world that the Navy and the Army and the other governmental agencies placed them (R. 133). In total they demanded all of the facilities of all casualty companies, both stock and mutual, which had strong and far reaching engineering and claim service organizations which were equipped to handle safety problems and compensation claims and other claims whether the claims were made at the site of the project or whether the claims had to be serviced anywhere in the United States or elsewhere in the world.

In order to make all insurance facilities available and to eliminate price differentials, the War Projects Rating Plan was developed and promulgated by the United States Navy, by the United States Army and other Government agencies (See Def. Ex. 18, R. 155).

The Plan was adopted for use solely in connection with projects which the United States Navy and other governmental agencies contracted for on a cost-plus-a-fixed-fee basis with the prime contractors. The Plan adopted provided for the placing of this insurance on a cost-plus-a-fixed-charge basis. The Plan as so promulgated stipulated what elements of cost were to be included in the computation of the final earned premium. No provision was made in that premium for any profit whatever for the insurance carrier.

No provision was made in that premium for any commission or salary to be paid to any agent or broker. Parity of price was established for all carriers irrespective of whether they were stock or mutual. Thus, the total resources of the casualty insurance business were made available to the war effort (R. 135).

The Plan also provided that the prime contractor should employ the services of an insurance advisor. The Plan stipulated that it was not necessary that this advisor be an insurance agent. The Plan further stipulated that the duties of the advisor included the checking of all policies and endorsements issued by the carrier, the checking of all classifications and rates used in the determination of the standard premium, the checking of losses incurred and the checking of the computations of the preliminary earned premium and the final earned premium. The fees for this service were stipulated in the Plan. The fees were payable by the contractor to the advisor. They were not incorporated in and had nothing to do with the provisions of the Plan under which the contractor was obligated to the insurance carrier for the premium the Plan (R. 156).

The Plan stipulated that the following endorsements developed in accordance with the requirements of the plan be attached to the policies.

(a) *Workmen's Compensation Policies.*

(1) War Projects Insurance Rating Plan Endorsement (Endorsement 3016 on Policy WUB-863386).

(2) General Endorsement for Workmen's Compensation and Employers' Liability policy (Endorsement 3013 on Policy WUB-863386).

(b) *Automobile Liability Policies.*
General Endorsement for Automobile Liability policy (Endorsement 3015 on Policy WSLA-863388).

(c) *General Liability Policies.*
General Endorsement for General Liability policy (Endorsement 3014 on Policy WSLG-863387).

Paragraph 1 of each of the General Endorsements stipulated that the insurance was to apply to the prime cost-plus-a-fixed-fee subcontractors engaged by the prime contractor on the project.

Paragraph 7 of the General Endorsement for Automobile Liability policies and Paragraph 11 of the General Endorsement for General Liability policies provided, respectively, that the final earned premiums for these policies were to be determined in accordance with the provisions and requirements of the War Projects Insurance Rating Plan Endorsement forming a part of the Standard Workmen's Compensation and Employers Liability policy.

In that way the determination of the final earned premium for the three policies was brought together as a composite unit under the terms of the War Projects Insurance Rating Plan endorsement forming a part of the Workmen's Compensation policy.

The War Projects Insurance Rating Plan embodies retrospective rating (R. 133) which is a sound rating principle. Such rating is used when the individual risk is large enough to warrant its use and when it is desired that the final earned premium on the risk involved be determined at the end of the policy period

upon the basis of cost. In most retrospective rating plans charge is generally included for the payment of acquisition expense though invariably on a scale greatly reduced from that applicable to smaller risks written at prospectively determined premiums or rates. That was why Mr. Ware's agency contract (Exh. A-2) specified that with respect to any business procured by him, which was written on a restrospective basis, the commissions which might be retained by him, as otherwise specified in his agency contract, were not applicable. In most retrospective rating plans, provision is also made for some profit to the carrier.

On a risk so very great in size as was the Farragut Naval Training Station project it was actuarily sound and it served the best interests of all concerned to have the rating plan developed upon a basis which would give recognition to the various kinds of losses covered by the several policies, on a composite basis.

The War Projects Insurance Rating Plan Endorsement stipulated that standard premiums be computed under the three policies subject to the plan for the following purposes:

(a) Determination of the maximum premium

(b) Determination of the fixed charge

(c) Determination of the deposit premiums

(d) Determination of interim premium payments.

The use of standard premiums for such purposes is common to the use of retrospective rating generally. The standard premiums referred to are the premiums determined under the terms of the policy other than the War Projects Insurance Rating Plan endorsement.

The payment of the deposit premium and the payment of the interim premiums were to provide the insurance carrier with interim funds sufficient to meet engineering, claim administrative, general administrative costs and the claim costs during the progress of the work during the policy period.

(2) Legality of the War Projects Insurance Rating Plan in Idaho.

A. *The United States Navy required the use of the Plan on this project.*

The Bureau of Yards and Docks, Navy Department, required by administrative ruling that the Workmen's Compensation and Employers' Liability, Automobile Bodily Injury Liability, and Property Damage Liability and General Bodily Injury Liability insurance written by the defendants to cover the operations of the Walter Butler Company in the building of the naval base known as the Farragut Naval Training Station in Kootenai County, Idaho, be written in accordance with the requirements of the War Projects Insurance Rating Plan (R. 155).

The United States Navy thus indicated that in its opinion there was nothing in the laws of Idaho which would preclude the use of the War Projects Insurance Rating Plan, without prejudice or embarrassment or harassment to the carrier or to the insured.

B. ***There is nothing in the laws of Idaho governing casualty insurance premiums or bond premiums or governing commissions payable on casualty insurance or requiring that any percentages of premium be paid to anyone for any services either in the production of or the countersignature of casualty insurance covering risks in Idaho.***

It is abundantly clear that the Idaho statutes contain no provisions of any nature whatsoever

(a) Which govern or determine the premium to be charged for any casualty risk, or

(b) Which specify that any commission whatsoever is payable on any risk or which stipulate any specific rates of commission of any kind in relation to casualty insurance or bonds, or

(c) which stipulate that a duly licensed resident agent of Idaho shall be recompensed in any specific or specified manner by an insurance carrier for the services rendered by him either in the production of business or in the servicing of business or for the simple act of countersigning policies, or which stipulate that such agent shall be recompensed by salary or by a certain percentage of premiums as commission or by any combination or variation of such methods, or which forbid such agent and the carrier from making such arrangements as are mutually agreeable to and agreed upon by him for the payment of any percentages of premium or of any specific amounts for various services, be they for the production of business or for other services in relation thereto or for the effortless act of countersignature, or

(d) which contemplate or sanction so vicious a feather-bedding privilege as the plaintiff seeks

for the brief act of countersignature of three policies and two bonds under the War Projects Insurance Rating Plan (and two policies outside of the Plan), no one of which countersigning acts could have taken more than a few seconds of Mr. Ware's time.

The War Projects Insurance Rating Plan is a reasonable rating plan, for the reasons stated. In the absence of any specific prohibition of the use of this Plan in Idaho by a clear and unambiguous statute, the Plan was appropriately used in Idaho, just as it was throughout the United States, in connection with cost-plus-a-fixed-fee projects under the jurisdiction of the United States Navy, the War Department and the other government agencies hereinbefore referred to.

C. Section 40-905 of the Idaho Insurance Code does not require that an agent be paid any commission.

See Brief p. 15, *supra*.

D. Use of the War Projects Insurance Rating Plan is entirely consistent with the requirements of Section 40-902 of the Idaho Insurance Code.

(1) Section 40-902 has no application to insurance policies made, written and placed outside of Idaho.

We have heretofore pointed out that Sec. 40-902 has no application to insurance policies made, written or placed outside of Idaho (Br. p. 26, *supra*). Assuming arguendo that Section 40-902 does apply to policies made, written and placed in New York, as was the case here, there is nothing in that section which prohibits the use of the plan by foreign carriers.

(a) ***The statute does not stipulate that any specified percentage or amount shall be paid to any agent or broker for the production of the business or for the countersignature of the policies.***

See Brief p. 23, 35, *supra.*

(b) ***Agents and brokers on the one hand and insurance carriers on the other are entirely free, under the Idaho Insurance Code, to make any contracts or agreements mutually acceptable to them for the services performed.***

The trial court so found (R. 90).

(c) ***There is nothing in Section 40-902 which requiries that a countersigning agent shall keep any specified amount of commission even when a commission is in fact paid by the carrier for the business. The countersigning agent is entirely free under the statute to remit the entire commission or any part thereof in accordance with any agreement which he may make with the carrier or the producing agent or broker.***

The Idaho Statute in this respect is quite different from both the Virginia and Montana Statutes, each of which regulate the amount of commission that the local agent may retain of commission actually paid. See Section 4226a of Virginia Statutes; *Springfield Fire & Marine Ins. Co. v. Holmes, supra.*

Section 40-902 does not apply to domestic carriers.

To argue that Section 40-902 prohibits use of the War Projects Insurance Rating Plan in Idaho by a foreign company is to argue then that under Idaho law it is entirely permissible for domestic carriers to make contracts of insurance on a premium basis on which no commission is payable by the carrier to any

agent or broker and that it is illegal, because of Section 40-902, for foreign carriers to make similar contracts within the state. The rankest and most unfair discrimination would be involved in such an interpretation.

E. *Section 40-1107 of the Idaho Insurance Code does not prohibit use of the War Projects Insurance Rating Plan.*

Section 40-1107 (App. 13) is a penal statute which prohibits rebating and specifies the sentences to be imposed in the event of conviction for violation of the provisions of the section.

1. Rebating not involved in use of the War Projects Insurance Rating Plan.

Rebating in general insurance practice is the improper return or reduction or discount made available to one person in a class by way of discrimination against other persons in the same class. "Of course, rebating generally is discrimination; * * *" 29 Am. Jur. p. 330.

> "the object or intent of statutes aimed against discriminations and rebates is that uniform rates shall be established and maintained, so as to secure to all persons equality as to burden imposed, as well as to benefits derived, by preventing discrimination by insurers in favor of individuals of the same class, either as to premiums charged or dividends allowed, or, as it has been stated, in order that prospective insurants of the same class shall not be unfairly treated or discriminated against, by inducements being given to one of such class, which are not available for all here-

in." Couch, Cyclopedia of Insurance Law, Vol. 3, Sec. 584, beginning on page 1872.

The War Projects Insurance Rating Plan was not made applicable by way of preferential treatment by the defendants to the Walter Butler Company with respect to premiums payable on the Farragut Naval Training Station Project.

On the contrary, the plan was made applicable by the United States Navy to all of its large projects written on a cost-plus-a-fixed-fee basis wherever those projects were located throughout the country.

There was no selection of the plan either by the defendants or by the insured. *The plan was required on the project by the United States Navy.* There was no rebating or discrimination in its use by the defendants on this project.

The War Projects Insurance Rating Plan was submitted for approval in every state under the laws of which the rates for Workmen's Compensation Insurance or Automobile Liability Insurance or General Liability insurance were subject to approval. The test generally applicable to rates and rating plans in all states where the rates are subject to approval are that the rates shall be adequate and that they shall not be excessive or unfairly discriminatory. In many of these states, there are additional laws against rebates, yet in state after state, the War Projects Insurance Rating Plan was approved (Brief p. 89, *infra*).

2. There was no "rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon" within the meaning of the first part of Section 40-1107.

The first part of the first paragraph of Section 40-1107 provides that:

> "No insurance company, association or society, by its or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to insurance or in connection therewith, on any risk in this state, nor or hereafter to be written, *any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon;*"

The words "the premium payable on the policy" must necessarily mean the final earned premium payable on the policy. The defendants, the insured and the United States Navy all indicated from the very inception of the undertaking when the binder was first issued (Ex. 24, R. 203), and throughout the undertaking, that the final premium for the risk was the premium earned in accordance with the requirements of the War Projects Insurance Rating Plan.

The interim payments provided for were simply a means of providing the defendants with necessary funds to pay claims and to administer the risk until the final earned premiums were determined.

In order to have any rebate "of the agent's commission thereon," it is entirely clear that some commission must have been a part of the plan initially. The case of *Smith v. Kleinschmidt* (Mont.) 187 Pac. 894, shows clearly what a rebate of commission is.

No commission having been fixed, either by law or by agreement, as payable by the defendants under the policies subject to the War Projects Insurance Rating Plan and no commission in fact having been paid by the defendants to any agent or broker under these policies, Section 40-1107 can have no application whatsoever to this case.

This penal provision of the Idaho Code in relation to commissions means no more than that an agent may not promise or give to a prospective insured or to an insured some part or all of the commission which the agent is entitled to when the insurance is placed, so as to give to that insured some preferential treatment not accorded to others in the same class.

3. The War Projects Insurance Rating Plan was not used as an inducement to insurance.

There are three main parts to the first paragraph of Section 40-1107. The parts are divided by semicolons. Each one of the parts contains the following qualifying words, no one of the parts being applicable unless the practice prohibited in the particular part was used:

> *"as an inducement to (such) insurance or in connection therewith."*

The words appear in the first part, once in the second part, and again in the third part without the word "such." They also appear once in the second part with the word "such."

Obviously, neither the defendants nor any other party used or offered to use the War Projects Insurance Rating Plan as an inducement to the insurance afforded the Walter Butler Company.

The War Projects Insurance Rating Plan was simply a rating method used in conjunction with the insurance afforded. Its use was required by the United States Navy on the project. It was in no way an undercover or outside arrangement which the defendants used as a means of securing the insurance.

The words "*or in connection therewith*" follow the words "*as an inducement to insurance*" each time that the latter words are used in the section except at the end of the first paragraph. We believe that the words "or in connection therewith" are intended to mean and do mean in connection with an inducement to insurance. As a practical matter, when rebate or unfair discrimination are offered or promised or involved, they are almost invariably promised or offered at the time that the insurance is placed.

It is immaterial, however, whether the prohibitions apply only in relation to inducements to insurance or apply generally in connection with insurance, since the War Projects Insurance Rating Plan is in no sense a rebate in any event.

The Plan was used in state after state (R. 133).

See Haugh, "The Comprehensive Insurance Rating Plan," Vol. XXVIII, Part II, No. 58, Proceedings of the Casualty Actuarial Society.

Had there been any basis for the plaintiff's claim that the use of the plan was illegal because it constituted a rebate within the meaning of the rebating statutes, the plan would certainly not have been approved in states, where rates were subject to approval nor would it have been permitted in the other states

which have anti-rebate laws, but which did not at that time have rate regulatory laws.

4. Prohibition of allowance "* * * which is not specified, promised or provided for in the policy contract of insurance; * * * nor except as specified in the policy contract."

Workmen's Compensation and Employers' Liability Policy WUB-863386 Automobile Liability Policy WSLA-863388 and General Liability Policy WSLG-863387 were issued on May 18, 1942. War Projects Insurance Rating Plan Endorsement 3016 was attached to and made a part of the Compensation Policy. Paragraph 7 of general endorsement 3015, which is a part of the Automobile policy, and paragraph 11 of general endorsement 3014, which is a part of the General Liability policy, provided that the premiums for such policies were to be computed in accordance with the provisions of the War Projects Insurance Rating Plan Endorsement attached to the Compensation policy (See Def. Ex. 8, R. 122).

The Compensation Policy WPB-863386 was written on a policy form of the Edition of July 1933. The 'Declarations' page of that policy did not contain a printed notation reading 'Symbol numbers of endorsements forming a part of the policy on its effective date,' nor a space immediately following that printed notation for typewritten entry of the symbol numbers of such endorsements, such as were incorporated in the later edition Compensation, Automobile and General Liability forms.

The 'Declarations' page of WUB-863386 as issued

contains typewritten notation relating to endorsement 3013 in items 1 and 7, to schedule 2921 in two places in item 3, and to endorsement 2776 in item 3. These entries were in accordance with company practice existing at the time that this policy was issued.

"There was no typewritten record on the 'Declarations' page of WUB-863386 of the following endorsements:

3016—War Projects Insurance Rating Plan Endorsement

11-2990—Idaho Compensation Statutory Endorsement

because it was not Company practice at that time on that policy to enter typewritten record on the 'Declarations' page of the numbers of such endorsements. Both of these endorsements were attached to the policy however and both formed a part of the policy at the date of issue.

The policy could have had no application whatever with respect to the Workmen's Compensation Law of Idaho unless endorsement 11-2990, which cites the Compensation Act of Idaho and makes the policy applicable in relation thereto had formed a part of the policy at its date of issue. If endorsement 11-2990 was not attached to and did not form a part of the policy, the policy had no application in Idaho and in that event nothing in Idaho law had anything to do with the policy.

Mrs. Michaelson testified on cross-examination that she saw the War Rating Plan Endorsement when the policy was countersigned (R. 243).

Mr. Peterson testified that Endorsement 3016 and Endorsement 11-2990 were attached to the policy at its time of issue (R. 212).

There is clear evidence on the "Declarations" page of WUB-863386 that Endorsement 3016 was attached to and did form a part of the policy at its date of issue. The typewritten entry on the "Declarations" page reading:

"Deposit premium for this policy $44,517.75."

is for an amount which is exactly 15% of the estimated advance premium of $296,785.00 which is shown on the "Declarations" page of the policy. The deposit premium of 15% was in accordance with the requirement of Paragraph 3 of the War Projects Insurance Rating Plan Endorsement No. 3016.

Had Endorsement No. 3016 not been attached to the policy at its inception, the entire estimated advance premium would have been payable and the Declarations page would have contained no reference to a deposit premium.

Endorsements issued during the policy period, all interim premium payment, preliminary premium adjustment and final premium adjustment were all in accordance with the provisions of Endorsement 3016 and all further established the fact that that endorsement was attached to and formed a part of Policy WUB-863386 when that policy was issued on May 18, 1942.

Accordingly, those parts of §40-1107 which apply to certain undertakings outside of the policy contract have no application to this case. Indeed, even

if the endorsement was not attached to the policy at the time it was countersigned, that would be a fact of which only the insured could take advantage, not the countersigning agent. However, the trial court found that the War Projects Insurance Rating Plan endorsements were attached to the policies issued under the Plan (R. 82).

6. The contention that the $5 per month contract is void as against public policy.

This matter has been fully discussed above, page 14, 44. In that connection we again call the court's attention to *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, entirely ignored in appellant's brief, although fully discussed and commented upon by the appellees in the argument below. None of the cases cited by counsel holds to the contrary.

Appellant concedes that the $5-per-month contract would apply to small premium policies (App. Br. 13, 41-2, 48). He apparently contends the contract inapplicable to large premium policies. However, the agreement doesn't say so. No more effort is required in the occasional signing of large premium policies than small ones. The trial court upheld both the validity of the contract and its applicability to the policies here involved (R. 87).

7. The contention that the plaintiff has a direct cause of action under the statute for commissions.

Appellant contends that a direct cause of action has been conferred in appellant's favor for commissions. Indeed, this contention is essential to her position, for even if she is entitled to commissions, un-

less the statute gives her a cause of action therefor she cannot recover. We also pointed out that no such remedy is conferred by the statute. The trial court with reference to the contention that a remedy was conferred, rejected that contention and said (R. 75):

> "The Court cannot write remedies into the statute which are not specifically mentioned. * * *."

Certainly there is nothing in the decisions relied on by the appellant, pp. 66 to 68, which announces anything except general statements which may be perfectly sound in the particular cases involved but which can have no application here under the provisions of the Idaho statute which contemplated administrative remedies by the state rather than a private remedy by the countersigning agent.

CONCLUSION

Following the decision on the first appeal in the *Ware* case (150 F.(2d) 463) this court remanded the case back to the District Court for the express and specific purpose of ruling on questions not theretofore ruled upon by the District Court. On remand the court stated:

> "However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the Federal Judge in Idaho is in a position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial.

In compliance with the mandate of this court, the District Court considered each of the questions involved and the contentions of the respective parties and resolved all controlling issues, both of fact and of law, in favor of appellees. This, the District Court did "in the light of all the facts as disclosed in the course of a trial" and the decision of the District Judge represents, to use the language of the opinion of this court, "the contribution which the Federal Judge in Idaho is in a position to make."

It is respectfully submitted that the contribution so made by the Federal Judge is clearly right and that the trial judge's findings and conclusions are supported by the evidence and by the law and that his judgment of dismissal should be affirmed.

Respectfully submitted,

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APPENDIX

The court stated, *Ware v. Travelers Ins. Co., et al.*, 150 F.(2d) 463, p. 464:

> "Appellees contend that the Idaho statute has no application to the policies and bonds written in this instance, inasmuch as they were not negotiated or written in Idaho. They say, too, that the phrase 'full commission' has no meaning as applied to a situation where no agent has received a commission. They argue, further, that the statute is not to be read into Ware's contract; and that assuming a right of recovery is intended to be conferred on the agent, nevertheless the right may be waived, and in this instance impliedly was waived by Ware in his contract with the companies. However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the federal judge in Idaho is in position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial."

That statute read as follows (R. 88, §40-902):

> "Foreign Companies — Resident Agents— Countersigning Policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall

countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * provided this section shall not apply to life insurance companies."

Rule 52(a):

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *."

Section 40-1002:

"NON - RESIDENT AGENTS — RECIPROCITY — SPECIAL AGENTS. If, by the laws of any other state, residents of the state of Idaho, are prohibited from holding license to represent life insurance companies or to solicit life insurance in such other state, the department shall refuse to issue agent's certificates of authority for the solicitation of life insurance in this state to residents of such other state: provided, that a license may be granted to a special agent of such other state authorizing such agent to work with and assist local agents in this state in writing business, but in all such cases the local agent is to retain his full commissions. Each non-resident special agent granted a license under this provision shall pay an annual fee of five dollars, and all licenses issued therefore shall expire on the thirty-first day of March subsequent to the date of issue."

Section 40-1501 of Chapter 15 reads:

"FIRE INSURANCE BROKER DEFINED—'Broker,'

or 'fire insurance broker,' as used in this chapter, is any person, copartnership or corporation, who, for compensation, not being a licensed resident insurance agent, acts or aids in any manner in negotiating contracts or fire insurance or reinsurance or placing fire risks or effecting fire insurance or reinsurance for a person other than himself or itself."

Section 65-510:

"STATUTES AND RESOLUTIONS — WHEN EFFECTIVE — No act shall take effect until sixty days from the end of the session at which the same shall have been passed except in case of emergency, which emergency shall be declared in the preamble or body of the law.

"Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

Chapter 145, Laws 1915, page 318:

"Sec. 31. It shall be unlawful for any foreign insurance company doing business in this State to make, write, place or cause to be made, written or placed *in this State* any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this State, unless done through an agent who is a resident of this State, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the *full* commission when the premium is paid, to the end that the State may receive the tax required by law to be paid on the premiums collected for insurance on all persons and property resident or located within this State.

Provided, this section shall not apply to life insurance companies."

Section 40-809:

"ANNUAL STATEMENT — FILING AND CONTENTS—* * * Every foreign insurance company, except life insurance companies, doing business in this state shall cause to be attached to said statement the affidavit of its president, manager or chief executive officer in the United States to the effect that all policies, bonds, duplicate policies or contracts of insurance of every kind and character, and all general and floating policies upon persons and property, resident, situated or located in this state, made, written, placed and caused to be made, written and placed in this state by said company during the year covered by said statement were so done only through agents, resident within this state and legally commissioned and licensed to transact insurance business therein; and that said resident agents had received, or, if the business is still pending, would receive the full commission therefor, when the premiums were severally paid * * *."

Section 40-803:

"ANNUAL TAX STATEMENT AND TAX—FIRE AND MARINE COMPANIES—All insurance companies licensed to transact business in this state in Classes 1 and 2, or either of them, of chapter 3 of this title, shall file with the department of finance annually on or before the first day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company on risks situated in this state during the year ending December thirty-first next preceding and pay to the department a tax of three per cent on the amount of such

gross premiums collected in excess of premiums and cancellations returned to such policyholders."

"40-804. ANNUAL STATEMENT AND TAX — OTHER COMPANIES. All insurance companies licensed to transact business in this state in one or more of classes 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of chapter 3 of this title shall file with the department of finance annually on or before the first day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company on risks in this state during the year ending December thirty-first next preceding, and shall pay to the department a tax of three per cent, on the amount of such gross premiums collected in excess of premiums and cancellations returned to such policyholders; provided, however, that only such companies licensed to transact business in class 3 may in computing the gross premiums also deduct the amount of dividends and coupons paid policyholders."

Section 40-901 (Before Ch. 258 1947 Idaho Laws):

"RISKS MUST BE WRITTEN IN AUTHORIZED COMPANIES BY LICENSED AGENTS. All insurance covering persons or property in this state must be written in companies authorized to transact business in this state, and only through their licensed agents; and all such insurance, excepting life insurance, must be written only through licensed agents residing within this state: provided, that the provisions of this section shall not apply to policies of reinsurance."

Section 40-902 was amended in 1939 to read as follows (Before Ch. 258 1947 Idaho Laws):

"FOREIGN COMPANIES — RESIDENT AGENTS— COUNTERSIGNING POLICIES—It shall be unlawful

for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, *except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid*: * * * provided, this section shall not apply to life insurance companies."

Section 40-901, effective July 1, 1947, has been changed. The amended statute requires of countersigning agents with reference to countersigning policies that they (Ch. 258 1947 Laws of Idaho)

"collect the premiums therefor, and * * * keep a record of the same, which shall contain the usual and customary information concerning the risk undertaken, including the full premium paid or to be paid therefor, to the end that the State may receive the taxes required by law to be paid on premiums collected for insurance on property or undertakings located in this State; * * *."

Class a:

Arizona—Insurance Code of 1941—Pamphlet Edition, Including 1943 Amendments—Section 61-332

Montana—Chapter 62, Laws of Montana—1941—

Section 1—But with a separate provision (Section 3) dealing with risks located within the state but contracted or originating outside the state

Pennsylvania—Laws of Pennsylvania—1933, Act No. 215, Section 610

South Dakota—South Dakota Insurance Laws 1942—Pamphlet Edition, Section 31.2218

New York—Consolidated Laws of New York, Chapter 28, Article 6, Section 130

North Carolina—Insurance Laws of North Carolina—Reprint from General Statutes of North Carolina 1943 and 1945 Cumulative Supplement, Section 58-41

Class b:

Colorado—Annotated Insurance Laws of the State of Colorado—1940—With Amendments and Additions Enacted by the 1945 General Assembly—Section 191

Delaware—Insurance Laws, State of Delaware—1940—Including Amendments through General Sessions—1945—Pamphlet Edition Para. 478, Section 17.

Iowa—Iowa Insurance Code, 1935 as Amended by 1939 Session Laws, Chapter 28 S.F. 164, Section 2. Section 4 deals with proposals originating outside the state and the commissions payable to a countersigning agent by reason thereof

Kansas—General Statutes, 1935 as Amended by Section 1, Chapter 250, Laws of 1937, Section 40-246

Kentucky—Kentucky Insurance Laws—1943—Pamphlet Edition, Section 298.150

Washington—Remington's Revised Statutes, Section 7080.

Similar provisions are contained in the insurance statutes of the states of Michigan, Mississippi, Ohio, Oregon, South Carolina, Utah, West Virginia and Wyoming.

See, for example:

Class c:

Massachusetts — While requiring countersignature, Chapter 175, Annotated Laws of Massachusetts, Section 157 expressly provides "This section shall apply only to acts done and contracts made within the Commonwealth."

Nevada — General Insurance Laws, 1941 — Pamphlet Edition, Section 154 expressly provides for a 5% payment to the countersigning agent subject to a minimum of $1 and maximum of $50.

Virginia—Code of Virginia, §§4222, *et seq.*

Virginia

Section 4222. * * * (a) Insurance companies, legally authorized to do business in this State, except life, title and ocean marine insurance companies, shall not make contracts of insurance or surety on persons or property herein, except through regularly constituted and registered resident agents or agencies of such companies; no contract of insurance or surety covering persons or property in this State, except contracts of life, title and ocean marine insurance and except temporary binders covering other forms of insurance shall be written, issued or delivered by any such authorized insurance company, or any representatives, unless such contract is duly countersigned in writing by a resident agent or agency of such company; provided, however, that the countersignature of an insurance agency shall not be considered valid unless such countersignature be attested to in writing by a

regularly constituted and registered resident agent of such company.

No State agent, special agent, company representative, salaried officer, manager or other salaried representative of any legally authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety, or any renewal thereof, covering persons or property in this State, except contracts of life, title and ocean marine insurance, provided that this section shall not apply to railroad companies and other common carriers engaged in interstate commerce.

* * * * * * * * * * *

Section 4426-a. No resident agent or agency may write, countersign, issue or deliver any contract of insurance or surety upon persons or property in this State unless there shall be collected at the time the contract is written, issued or delivered, or within a reasonable time thereafter, the full premium on such contract, and the resident agent or agency shall be entitled to and shall receive the usual and customary commissions allowed on such contracts, provided that such resident agent or agency may write such contracts at the request only of such other resident agents or agencies, when such agent or agencies are properly licensed to transact the class of business involved in such exchange, and licensed non-resident insurance brokers who may be authorized by law to broker such contracts, and on exchange of business between resident agents or agencies in Virginia and licensed non-resident insurance brokers in other states the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding fifty per centum of the resident agent's or agency's commission allowed on such business.

The Montana statute is quoted in *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 Fed. Supp. 964 at page 967. Section 1 provided:

Section 1:

"It shall be unlawful for any insurance company * * * doing business within the State of Montana * * * to make, write, place, or cause to be made, written or placed in this State, any policy, bond, duplicate policy, contract of insurance or contract of indemnity of any kind or character, or any general floating group policy upon persons or property, or upon any insurable risk, resident, situated or located in this State, unless written through and countersigned by an agent of this State, duly licensed to transact insurance, bonding or indemnity business therein.

"A resident agent shall countersign all policies, bonds or contracts of indemnity so issued, and shall receive the full commission on all such policies, bonds or contracts of insurance on indemnity, when the premium is paid, to the end that the State may receive the tax required by law to be paid on the premiums collected for insurance on all persons, property or other insurable risks resident, situated or located within the State; provided that nothing in this act shall be construed to prevent any insurance company or association from issuing policies, bonds or contracts (of insurance) at its principal or department offices, covering property or persons or other insurable or indemnity risks resident, situated or located in this State; provided, however, such policies are issued upon application, procured and submitted to such comany or association by a resident agent, who shall keep a

record of all such policies, bonds or contracts of indemnity so issued, and countersign the same, and that said resident agent or agents shall receive the full commission on all policies when premium is paid. It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this act; and any violation of this provision shall be punished as provided in Sections 6123 and 6124 Revised Codes of Montana, 1935 * * *.

Section 40-906:

"PENALTY FOR ACTING AS AGENT WITHOUT LICENSE—It shall be unlawful for any person to act within this State as an agent, or otherwise, in soliciting or receiving application for insurance of any kind or class whatever, or in any manner, directly or indirectly aid in the transaction of the business of any insurance company incorporated in this State or out of it without first procuring a certificate of authority from the department of finance.

"Any person who solicits or aids in soliciting business for any insurance company without the certificate herein required, or after such certificate has been withdrawn or revoked, or any agent who accepts an application from any person who is a non-resident of this state, or a resident thereof not provided with the certificate of authority for an agent, as herein required, and in any way compensates or promises to compensate such person from whom he receives such application shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $100.00, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

"Nothing in this Act shall be considered as prohibiting the authorized agent of any company, duly licensed to transact such business in this State, from exchanging business with the authorized agent of any other company licensed to transact the same character of business in this state: providing that the provisions of this section shall not apply to the salaried officers or representatives of Reciprocal or Interinsurance Exchanges or of the attorneys-in-fact thereof who do not work on a commission basis."

Section 40-809:

"ANNUAL STATEMENT—FILING AND CONTENTS —All insurance companies licensed to do business in this state, unless otherwise provided in this act, shall file with the department of finance annually, on or before March first, in each year, a statement under oath, upon a form to be prescribed and furnished by the department, stating the amount of all premiums collected or contracted for by the company making such statement, in this state, during the year ending December thirty-first next preceding; the amounts actually paid policyholders on losses; the amounts paid policyholders as return premiums; the amounts paid policyholders as dividends; the amount of insurance reinsured in other companies authorized to do business in this state, and the amount of premiums paid therefor; and the amount of insurance reinsured in companies, naming premiums paid therefor; and the amount of reinsurance accepted from admitted companies and the premiums received for such reinsurance on residents located in this state, with the names of the companies so reinsured.

"Every foreign insurance company, except life

insurance companies, doing business in this state shall cause to be attached to said statement the affidavit of its president, manager or chief executive officer in the United States to the effect that all policies, bonds, duplicate policies or contracts of insurance of every kind and character, and all general and floating policies upon persons and property, resident, situated or located in this state made, written, placed and caused to be made, written and placed in this state by said company during the year covered by said statement were so done only through agents, resident within this state and legally commissioned and licensed to transact insurance business therein; and that said resident agents had received, or, if the business is still pending, would receive the full commission therefor, when the premiums were severally paid.

"No license shall be issued to any company until such annual statement and affidavit, if required, be filed.

"The annual statement made to the department pursuant to this section, or other provisions of law, shall include the substance of that required by what is known as the convention blank form, adopted from year to year by the national convention of insurance commissioners, and shall also include such other information as may be required by the department."

Section 40-1107:

"REBATING PROHIBITED — No insurance company, association or society, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay directly or indirectly, as inducement to insur-

ance or in connection therewith, on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to such insurance, or in connection therewith, any earnings, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration as inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance; nor shall any such company, association or society, agent collector or broker, personally or otherwise, offer, promise, give, sell or purchase, as inducement to insurance or in connection therewith, any stock, bonds, securities or property, or any dividends or profits accruing or to accrue thereon, nor except as specified in the policy contract, offer, promise, or give any other thing of value whatsoever, as an inducement to insurance.

"No insured person, firm or corporation shall knowingly receive or accept, directly or indirectly, any rebate or premium or part thereof, or agent, solicitor or broker's commission thereon, payable on the policy, or on any policy of insurance or any special favor or advantage in the dividend or other benefit to accrue thereon; nor shall any such person, firm or corporation receive anything of value as an inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance.

"Any company, association, society, officer, solicitor, agent, broker or other person who violates any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of $100.00 for each and every violation, or to imprisonment in the county jail for a period of not less than ninety days nor more than six months, or both such fine and imprisonment.

"The department of finance shall have authority in its discretion to revoke the license theretofore issued to any company, association, society, agent or broker convicted of a violation of the provisions of this section.

"Any employee of any person, firm or corporation who shall receive, directly or indirectly, any rebate of premium or part thereof payable on a policy of insurance issued to the person, firm or individual by whom he is employed, or who receives any part of any agent's commission payable on the policy issued to such person, firm or corporation, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine not exceeding $100.00, or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment, for each and every such offense.

"Nothing in this section shall be so construed as to prohibit any company issuing nonparticipating life insurance from paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of the surplus accumulated from nonparticipating insurance; nor to prohibit any company transacting industrial insurance on the weekly payment plan from returning to policyholders who have made premium payments

for a period of at least one year directly to the company at its home or district offices, a percentage of the premiums which the company would have paid for the weekly collection of such premiums; nor to prohibit any life insurance company, doing business in this state, from issuing policies of life or endowment insurance with or without annuities, at rates less than the usual rates of premiums for such policies, insuring members of labor organizations, lodges, beneficial societies or similar organizations, or employees of any employer who, through their secretary or employer may take out insurance in an aggregate of not less than fifty members and pay their premiums through such secretary or employer."

Section 40-708:

"EXAMINATION OF FOREIGN COMPANIES. The department of finance shall have the same supervision, and, when it deems it necessary make the same examinations of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations doing the same kind of business, and of its assets, books, accounts and general condition. Every such foreign corporation, its agents and officers, shall always be subject to the same laws, rules and penalties as are imposed upon domestic insurance corporations doing the same kind of business, so far as the same are applicable thereto."

Section 40-711:

"CERTIFICATE FROM COMMISSIONER OF ANOTHER STATE. A certificate from the insurance commissioner of any state, who has recently examined the affairs of any company, may be accepted as evidence of the condition of the company, in lieu of the examination herein required."

Section 40-712:

"IMPAIRMENT OF CAPITAL — ASSESSMENT OR REDUCTION. Any insurance company transacting business within this state, whose capital stock shall become impaired to the extent of twenty-five per cent thereof, shall make good such impairment within sixty days by either an assessment upon the stockholders or the reduction of its capital stock: provided, that such capital stock shall in no case be less than the minimum amount provided by this act; and in the event of failure to make good such impairment within the said time, shall forfeit its rights to write any new business in this state until said impairment shall have been made good."

Section 43-1601:

"MEANS OF SECURITY — QUALIFICATIONS OF SURETY AND LIABILITY COMPANIES — DEPOSITS OF SUCH COMPANIES — Employers, but not including the state or the municipal bodies mentioned in section 43-903, shall secure compensation to their employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state insurance fund; or,

"2. By depositing and maintaining with the industrial accident board security satisfactory to the board securing the payment by said employer of compensation according to the terms of this act. Such security may consist of a surety bond or guaranty contract with any company authorized to do surety or guaranty business in Idaho and having a sufficient deposit with the state treasurer upon which execution may lawfully be issued against said company on behalf of any

workman secured under said bonds or contracts.

"No company shall be permitted to write surety bonds or guaranty contracts covering the liability hereunder of employees of this state unless it shall have been authorized to do business under the laws of this state and until it shall have received the approval of the board. Provided that any company approved by the board and duly authorized and licensed to write liability insurance in this state and having on deposit with the state treasurer or the department of finance evidences of indebtedness or securities in the amount of $100,000.00 of the class or classes eligible for investment in or representing the minimum capital required of a domestic liability insurance company of the state and which company deposits and maintains with the state treasurer of the state the securities specified in this section in an amount equal to the total amounts of all of the outstanding and unpaid awards against such company shall be permitted and authorized to write the surety bonds or guaranty contracts specified in this section covering the liability of the employers of the state and securing payment by said employers of the compensation required by the Workmen's Compensation Act; but this proviso shall not be construed to apply to any company making insurance in Class 5, as defined in section 40-306, Idaho Code Annotated. To the end that the workmen secured under this act by any such company shall be adequately protected the board is hereby authorized to make and change such reasonable regulations as they may deem necessary with reference to the capital stock, surplus and reserves of such companies, and to require such companies, self-insuring employers and the state fund to deposit and maintain with

the treasurer of the state money or bonds of the United States or of this state, or interest paying bonds when they are at or above par, or any other state of the United States or the District of Columbia, or the bonds of any county or municipal corporation of this or any other state of the United States or the District of Columbia in an amount equal to the total amounts of all outstanding and unpaid compensation awards against such employer or such company or the state fund or against the employers insured by such company or the state fund. In lieu of such money or bonds the board may require such company, self-insuring employer or the state fund to file or maintain with the treasurer of the state a surety bond of some company or companies authorized to do business in this state for and in the amounts equaling the total unpaid compensation awards against such company, self-insurer or state fund.

"The approval by the board of any such company may be withdrawn if it shall appear to the board that workmen secured therein under this act are not fully protected.

"The said money or bonds or said surety bonds so deposited with the state treasurer shall be an exclusive trust for the benefit of the workmen of the employers insured by such company or state fund or such self-insurers, to remain with said treasurer in trust to answer any default of said self-insurer or of said company or state fund as surety upon any such obligation established by final judgment upon which execution may lawfully be issued against said self-insuring employer or company or state fund; such self-insurer or company or state fund, however, at all

times shall have the right to collect the interest, dividends and profits upon such securities, and from time to time withdraw such securities or portion thereof, substituting therefor others of equally good character and value, to the satisfaction of the industrial accident board, and such securities shall not be sold under any process against such self-insurer or such company or state fund until after forty days notice to said self-insurer or company or state fund, supplying the date, place and manner of such sale, and the process under which and the purpose for which it is to be made, accompanied by a copy of such process. The state of Idaho shall be held responsible for the safety of all deposits made under the provisions of this section. Such self-insurer or company or state fund shall not be permitted to withdraw from the state treasurer such deposits of money or bonds or permit said surety bonds to lapse for a period of one year after discontinuing business within this state, or while any suit is pending or any judgment against said company in this state shall remain unpaid.

"The board is also authorized to make and change such rules and regulations as they shall deem necessary to secure the prompt payment of compensation awards under this act, and shall withdraw their approval of any company, whenever it appears that such company unnecessarily delays the payment of such awards."

Section 40-903:

"PENALTY FOR VIOLATION BY COMPANY. Any company wilfully failing to observe or comply with the provisions of section 40-901 and 40-902 shall be subject to and liable to pay a penalty of $500.00 for each violation thereof and for each

failure to observe and comply with the said sections. Such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof. Any insurance company or association which shall neglect or refuse for thirty days after judgment, in any such action, to pay the amount of such judgment, shall have its authority to transact business in this state revoked by the department of finance, and such revocation shall continue for at least one year from date thereof, nor shall any insurance company or association whose authority to transact business in this state shall have been revoked be again authorized or permitted to transact business herein, until it shall have paid the amount of each judgment and shall have filed in the office of the department of finance a certificate to the effect that the terms and obligations of the provisions of these sections are accepted by it as a part of the right and authority to transact business in this state."

Section 40-807:

"PENALTY FOR FAILURE TO PAY TAX. An organization failing or refusing to render such statement and pay the required tax of three per cent thereon for more than thirty days after the time so specified shall be liable to a fine of twenty-five dollars for each additional day of delinquency, and the taxes may be collected by distraint and same recovered by an action to be instituted by the attorney-general in the name of the state in any court of competent jurisdiction. The department of finance shall revoke the license of any delinquent company until the taxes and fine, should any be imposed, are fully paid, and notice thereof is given to the department."

The Pennsylvania statute:

"The Act of May 17, 1921, P.L. 682, art. 5, §501 (40 P.S. §631), which is a re-enactment of the Act of May 8, 1899, P.L. 258, provides, in part, as follows:

" 'No stock fire insurance company, association, or exchange, not incorporated under the laws of this State, authorized to transact business herein, shall make, write, place, or cause to be made, written, or placed, any policy, duplicate policy, or contract of insurance of any kind or character, or any general or floating policy upon property situated or located in this State, *except after the said risk has been approved in writing by an agent who is a resident of or whose principal place of business is in this State, regularly licensed to transact insurance business herein, who shall countersign all policies so issued, and receive the commission thereon when the premium is paid,* to the end that the State may receive the taxes required by law to be paid on the premiums collected for insurance on all property located in this State'."

Section 40-508:

"LIABILITY INSURANCE COMPANIES — QUALIFICATIONS. Any foreign stock insurance company making insurance in this state under class 6 of chapter 3 of this title shall have a capital stock of at least $200,000 fully paid, and a surplus of not less than $100,000; but such company shall not make insurance in this state in any other of said classes of insurance specified in said section except in classes 4, 5, 7, 8, 9, 10, 11, 12 and 14; and it shall not make insurance in class 5 without having additional capital of at least $100,000. Such company may make insurance in

one or all of the following classes: 4, 7, 8, 9, 10, 11, 12 or 14, when it has an additional capital of at least $50,000."

"43-1604. EFFECT OF FAILURE TO SECURE COMPENSATION. If an employer subject to the provisions of this act fails to comply with the provisions of section 43-1601, he shall be guilty of a misdemeanor and shall also be liable to a penalty for every day during which such failure continues of one dollar for each employee, to be recovered in an action brought by the industrial accident board in the name of the state of Idaho, and the amount so collected shall be paid into the industrial administration fund, and for this purpose, the district court of any county in which such employer carries on any part of his trade or occupation shall have jurisdiction.

"Furthermore, if any employer shall be in default under section 43-1601 for a period of thirty days, he may be enjoined, by the district court of any county in which such employer carries on any part of his trade or occupation, from carrying on his business while such default continues. All procedings in the courts under this section are to be brought by the industrial accident board in the name of the state of Idaho."

"43-1605. INSURANCE CONTRACT. Every policy of insurance in the state insurance fund and every guaranty contract or surety bond covering the liability of the employer for compensation, shall cover the entire liability of the employer to his employees covered by the policy, bond or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names either by at any time filing a separate claim or by at any time making the

surety a party to the original claim, the liability of the surety in whole or in part for the payment of such compensation: provided, that payment in whole or in part of such compensation by either the employer or the surety shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

"43-1606. KNOWLEDGE OF EMPLOYER TO AFFECT SURETY. Every such policy and contract shall contain a provision that, as between the employee and the surety, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge as the case may be, on the part of the surety; that the jurisdiction of the employer shall, for the purpose of this act, be jurisdiction of the surety, and that the surety shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this act."